Supreme Court, U.S.
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IN THE

Supreme Court of the United States

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GUY PIERCE, Warden, Pontiac Correctional Center

Petitioner,

v.

HENRY GRIFFIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether certiorari should be granted where there is a conflict among the circuits concerning the level of deference required under the AEDPA in a *Strickland* claim for a state court finding of fact following a bench trial in which the trial judge determined that omitted evidence would not have a reasonable probability of changing the outcome.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Griffin v. Pierce,* 622 F.3d 831 (7th Cir., 2010). A copy of the opinion is attached to this petition as Appendix A. The order of the United States District Court is recorded as *Griffin v. Mathy,* No. 98 C 5024 (N.D. Ill., July 29, 2009). A copy of the order is attached to this petition as Appendix B.

JURISDICTION

On September 22, 2010, the court of appeals reversed the district court's judgment in part and remanded with instructions to grant Griffin's habeas petition on the *Strickland* claim only and allow the State 120 days within which to resentence Griffin. On October 14, 2010, the court of appeals granted petitioner's motion to stay the mandate pending the filing of this petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. Trial

On July 1, 1985, a jury found Griffin guilty of murder, solicitation to commit murder and conspiracy. *People v. Griffin,* 592 N.E.2d 930, 931 (Ill. 1992) (*Griffin I*). Griffin waived his right to a sentencing jury and the court sentenced him to death. *Id.* In 2003, former Illinois Governor George Ryan commuted Griffin's sentence to life imprisonment. *Griffin v. Mathy,* No. 98 C 5024 (N.D. Ill., July 29, 2009) (Slip Op. 2).

Griffin, an enforcer for a drug lord named Charles Ashley, confessed that he fired four bullets into the back of Carl Gibson's head. *Griffin I*, 592 N.E.2d at 932. At the time of the shooting, Griffin was in a car driven by James Allen. *Id.* at 931-32. Griffin and Allen then dumped Gibson's body onto an exit ramp on one of Chicago's major expressways. *Id.* at 932.

Gibson was also an enforcer for Ashley, but Ashley ordered his execution because Ashley suspected that Gibson was giving information to the police. *Id.* at 931. At the time of the murder, the Chicago Police and the Cook County State's Attorney's Office were investigating Ashley's drug operation. *Id.* Ashley paid Griffin $2500 for the murder in cash and cocaine. *Id.* at 931-32.

Darryl Moore, another of Ashley's enforcers, corroborated Griffin's confession. *Id.* at 931. When Moore was arrested on unrelated charges, he offered to give information on the Gibson murder in exchange for lenient treatment. *Id.* Moore's information was sufficient for the State's Attorney's Office to arrange a judicially sanctioned overhear during which Moore placed a telephone call to Griffin. *Id.* When Griffin incriminated himself during the overhear, the police moved in and arrested him. *Id.* Griffin later confessed. *Id.* at 931-32.

At trial, the State introduced Griffin's confession and played the tape from the overhear. *Id.* at 932. Moore testified, corroborating Griffin's confession. *People v. Griffin*, 687 N.E.2d 820, 826 (1997) (*Griffin II*).

After trial, Moore recanted his testimony, claiming that he had been paid by the State's Attorney's Office to lie. *Griffin I*, 592 N.E.2d at 933. Thereafter, Griffin complained that the State knowingly used perjured testimony from Moore, but both the Illinois courts and the federal courts rejected the claim. *Griffin I*, *id.* at 932-33; *Griffin v. Mathy*, No. 98 C 5024 (N.D. Ill., July 29, 2009) (Slip Op. 18-28); *Griffin v. Pierce*, No. 09-3138 (7th Cir., September 22, 2010) (Slip Op. 20-25).

B. Sentencing

Griffin elected to waive his right to a capital sentencing jury and so presented his evidence to Cook County Circuit Court Judge Earl Strayhorn. *Griffin II*, 687 N.E.2d at 826. The State introduced evidence of Griffin's six prior felony convictions as well as all of the evidence adduced at Griffin's trial. *Id.* at 833.

In mitigation, counsel called two witnesses: Griffin and his girlfriend. *Id.* Griffin testified that he was 37 years old and that he had six children. *Id.* Griffin said he was a cocaine and heroin addict and that his prior convictions were related to his addiction. *Id.* He lived at a center for ex-convict/addicts. *Id.* He said that, in 1962 when he was a minor, he was placed in a mental institution for one year, but that he escaped twice. *Id.*

Griffin's girlfriend, Ida Powe, testified that she had known Griffin for over ten years. *Id.* She had not known him to act violently and he did not have a reputation for violence. *Id.*

Counsel also submitted a presentence investigation report containing information on Griffin's personal and family background, including his relationships with his parents, siblings, wife and children. *Id.* The report included information about his education, physical and mental health, and his addictions. *Id.*

On direct appeal, Griffin argued that his counsel was ineffective pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984) for not introducing his mental health records as mitigation. The Illinois Supreme Court rejected the claim because the records were remote in time. *Griffin I*, 592 N.E.2d at 937-38.

C. Post-conviction and Habeas

Griffin's two post-conviction petitions were presented to Judge Strayhorn, the same judge who had sentenced him to death. *Id.* at 932; *Griffin II*, 687 N.E.2d at 834. Griffin again argued that counsel was ineffective at sentencing. *Griffin II*, 687 N.E.2d at 833. Griffin said that counsel failed to introduce his school, mental health and prison records, a psychological evaluation, and affidavits from five family members. *Id.* Judge Strayhorn rejected Griffin's claim. *Id.* at 834.

The Illinois Supreme Court affirmed. *Id.* The court found that Griffin's proffered mitigation evidence was cumulative to the evidence already presented and not inherently mitigating. *Id.* The court concluded by emphasizing that the post-conviction judge was the sentencer at Griffin's trial and that the judge "stated that the introduction of this proffered evidence would not have changed defendant's sentence." *Id.*

In his federal habeas corpus petition, Griffin again argued that his counsel was ineffective at sentencing. After a hearing, the district court rejected the claim, finding that counsel's performance was deficient but that it had not caused Griffin prejudice. *Griffin v. Mathy,* No. 98 C 5024 (N.D. Ill., July 29, 2009) (Slip Op. 13). The district court said that the Illinois Supreme Court could have rejected Judge Strayhorn's findings "as to the state of his own mind, ... but they did not." *Id.* at 18. The district court explained:

> There is nothing unusual either about reliance on the views of a judge as to whether some previously unknown circumstances would affect the sentence. Many opinions in federal post-conviction cases are resolved, in part or whole, by judicial statements that a new circumstance would not change a sentence. Remands by Courts of Appeals in federal cases to seek the view of a sentencing judge in light of changed circumstances are common and usually controlling.
>
> Given the deference owed to the state court findings of fact, I reject Petitioner's clam to the writ based upon ineffective assistance of counsel at sentencing.

Id. at 18.

The district court further noted that he would reach the same conclusion in this case even if no deference was owed. *Id.,* fn. 14.

The United States Court of Appeals for the Seventh Circuit reversed. *Griffin v. Pierce,* No. 09-3138 (7th Cir., September 22, 2010) (Slip Op. 25-30). The court held that counsel's sub-standard performance at sentencing prejudiced Griffin. *Id.* at 26. The court discounted any deference to the determinations made by Judge Strayhorn or the Illinois Supreme Court. The court said:

> The Illinois Supreme Court concluded that there was no reasonable probability that absent counsel's alleged errors, the sentencing court would have found that the mitigating evidence precluded the death penalty. The first problem with that assessment is that it is unclear to us how much weight the state supreme court gave to Judge Strayhorn's statement that the introduction of the proffered evidence would not have changed Griffin's sentence. Though we, and the Illinois Supreme Court, may give weight to such a statement, it is not conclusive. *Raygoza v. Hulick*, 474 F.3d 958, 964 (7th Cir. 2007) (stating that where the same judge presides over both the post-conviction proceeding and trial, "we cannot accept as conclusive the judge's statement that the new evidence would not have made any difference"). *The question is not whether a particular judge would have imposed a different sentence, but rather whether there was a "reasonable probability" that the sentence would have been different. In assessing that probability we conduct an objective evaluation of the evidence. Id.* at 964-65.

> Another problem: the Illinois Supreme Court gave consideration to the seriousness of Griffin's offense, the corroboration of Griffin's confession by other evidence, and his lengthy criminal history, but it did not properly evaluate the totality of the mitigation evidence and reweigh it against the aggravation evidence as it must. See, e.g., *Porter*, 130 S. Ct. at 453-54. After all, the state supreme court thought the proffered mitigation evidence was merely cumulative and not inherently mitigating. But most of the proffered evidence was neither. And the court's determination to the contrary was unreasonable.

Id. at 28-29 (emphasis added).

Thus, the court of appeals reversed the district court's judgment in part and remanded with instructions to grant Griffin's habeas petition on the *Strickland* claim only and allow the State 120 days within which to resentence Griffin. *Id.* at 30. On October 14, 2010, the court of appeals granted petitioner's motion to stay the mandate pending the filing of this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED WHERE THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE LEVEL OF DEFERENCE REQUIRED UNDER THE AEDPA FOR A STATE COURT FINDING OF FACT FOLLOWING A BENCH TRIAL IN WHICH THE TRIAL JUDGE DETERMINED THAT OMITTED EVIDENCE WOULD NOT HAVE A REASONABLE PROBABILITY OF CHANGING THE OUTCOME.

Griffin, a state prisoner, filed a petition for a federal writ of habeas corpus, alleging ineffective assistance of counsel at sentencing. In reviewing the claim, the United States Court of Appeals for the Seventh Circuit refused to defer to the factual determinations made by the very judge who made the original sentencing determination. Thus, the circuit court's decision conflicts with the basic principles set out in the AEDPA as well as with decisions from the Second, Sixth and Eleventh Circuits where the courts did defer to the findings of fact made by the state judges sitting as sentencers.

28 U.S.C. § 2254(d)(1) provides that an application for a writ of habeas corpus on behalf of a person in state custody shall not be granted unless the state court adjudication resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by this Court. This Court has repeatedly found that the unequivocal intent of the AEDPA is to defer to state court findings of fact. (*See, Renico v. Lett*, 559 U.S. ___, ___, 130 S. Ct.

1855, 1862, 176 L. Ed. 2d 678 (2010). *See also Wellons v. Hall*, 558 U.S. ___, ___, n. 3, 130 S. Ct. 727, 175 L. Ed. 2d 684 (2010) (per curiam); *Smith v. Spisak*, 558 U.S. ___, ___, 130 S. Ct. 676, 175 L. Ed. 2d 595 (2010); *McDaniel v. Brown*, 558 U.S. ___, ___, 130 S. Ct. 665, 175 L. Ed. 2d 582 (2010) (per curiam); *Cone v. Bell*, 556 U.S. ___, ___, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009); *Knowles v. Mirzayance*, 556 U.S. ___, ___ n. 2, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009); *Waddington v. Sarausad*, 555 U.S. ___, ___ , 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009)). Thus, when the Seventh Circuit refused to accord any deference to the Illinois state court findings, it violated the clear intent of the AEDPA.

The case at hand is distinct from cases involving sentencing *juries*. *See Porter v. McCollum*, 130 S. Ct. 447, 453 (2009); *Rompilla v. Beard*, 545 U.S. 374, 378 (2005); *Wiggins v. Smith*, 539 U.S. 510, 515 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). A jury, unlike the court sitting as fact-finder, cannot be reconstituted to determine whether it would have been influenced by additional mitigation.

In the case at hand, Griffin relied on *Strickland v. Washington*, 466 U.S. 668 (1984) and filed a state post-conviction petition alleging that his counsel was ineffective at his capital sentencing hearing because he failed to investigate and present certain mitigating evidence. Because Griffin had elected to be sentenced by a judge sitting without a jury, the sentencing court reviewed the omitted mitigation and determined that it would have no impact on its sentencing decision. The Illinois Supreme Court reviewed the omitted evidence and determined that it was either cumulative to evidence

already introduced or not inherently mitigating. *Griffin II*, 697 N.E.2d at 834. Thus, the Illinois Supreme Court concluded that the new information would not change the outcome of the sentencing hearing. *Griffin II*, 697 N.E.2d at 834.

When Griffin raised the *Strickland* claim in his petition brought under 28 U.S.C. § 2254(d)(1), the district court deferred to the state court findings of fact, but the Seventh Circuit did not. *Griffin v. Mathy*, No. 98 C 5024 (Slip Op. 13); *Griffin v. Pierce*, No. 09-3138 (Slip Op. 28) (noting that it "may give weight" to the state court finding, but that it is not conclusive). In this way, the Seventh Circuit failed to give the Illinois Supreme Court the deference required by AEDPA.

The Ninth Circuit is in accord with the Seventh Circuit. In *Stanley v. Schriro*, 598 F.3d 612 (9th Cir, 2010), the court remanded for an evidentiary hearing to consider omitted mitigating evidence regarding the petitioner's mental state, even though the sentence was imposed after a bench hearing.

In contrast, the Second, Sixth and Eleventh Circuits extend full deference under AEDPA to state court decisions. In *Kokal v. Sec'y, Dep't of Corr.*, 623 F.3d 1331, 2010 U.S. App. LEXIS 21439 (11th Cir. 2010), the claim was that counsel was ineffective at sentencing for failing to investigate evidence that the inmate suffered organic brain damage. 2010 U.S. App. LEXIS 21439, *38-39. Although a jury sentenced the inmate, Florida law requires the judge to independently review the evidence and make detailed written findings regarding the aggravating and mitigating circumstances. *Id.* at 10-11.

The Florida Supreme Court reviewed the evidence and determined that the facts of the crime and the four eligibility factors outweighed the value of the proposed mitigation evidence. The Eleventh Circuit said that it was obliged to afford AEDPA deference to the Florida Supreme Court decision and affirmed the district court's denial of relief under 28 U.S.C. § 2254(d)(1). *Id.* at 42-44.

The Sixth Circuit is in accord as it will generally defer to the state court findings of fact and the state court application of federal precedent. *Phillips v. Bradshaw*, 607 F.3d 199, 209 (6th Cir. 2010). The court engages in a more thorough review when the state court opinion is cursory. *Id.*

In *Dunham v. Travis*, 313 F.3d 724 (2nd Cir. 2002), the Second Circuit deferred to the state trial judge's ruling at a bench trial when considering an ineffective assistance of counsel claim brought under AEDPA. *Id.* at 727. The issue was that counsel was ineffective at petitioner's rape trial for failing to impeach the complaining witness with a prior inconsistent statement. *Id.* at 728. The claim was first raised in state court in a motion to vacate the judgment and the same trial judge ruled that "the allegations were insufficient to establish ineffectiveness..." The court held that counsel had made a strategic decision. *Id.* at 728. The Second Circuit agreed with the state trial judge that counsel's decision was strategic. *Id.* at 732. The Second Circuit also said the following.

> Even if trial counsel's decision not to impeach Desio with her prior inconsistent statements was unreasonable, Dunham suffered no

> prejudice from this error. The state judge, sitting as fact-finder, convicted Dunham while admitting to some doubts about Desio's testimony. He did this based on his conclusion that the physical and scientific evidence "exclude beyond a reasonable doubt every hypothesis but guilt." Because the state judge expressly convicted Dunham despite doubts about Desio's credibility, there is no "reasonable probability" that further impeachment of her credibility would have changed the verdict. *Strickland*, 466 U.S. at 694.
>
> *Our belief that Dunham suffered no prejudice is further confirmed by the fact that the same state judge who convicted Dunham was unmoved by one of the allegedly inconsistent statements when it was raised in the § 440 motion before him.*

Id. at 732 (emphasis added).

Thus, in ineffective assistance of counsel claims involving bench trials or bench sentencing hearings, the Seventh Circuit is according much less deference to state court findings of fact than the Second, Eleventh and Sixth Circuits. As Justice Scalia noted in his dissent in *Allen v. Lawhorn*, 2010 U.S. LEXIS 9596 *10 (U.S. Dec. 13, 2010), federal courts fail "with alarming frequency" to accord proper deference to state court judgments in AEDPA cases. Therefore, this Court should grant certiorari to address this urgent problem and to resolve the conflict among the circuits.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED SEPTEMBER 22, 2010

In the
United States Court of Appeals
For the Seventh Circuit

No. 09-3138

HENRY GRIFFIN,

Petitioner-Appellant,

v.

GUY PIERCE,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division. No. 98 C 5024—**James B. Zagel**, *Judge.*

ARGUED MAY 27, 2010—
DECIDED SEPTEMBER 22, 2010

Before BAUER, WOOD, and TINDER, *Circuit Judges.*

TINDER, *Circuit Judge.* Henry Griffin was convicted by a jury of murder, solicitation to commit murder, and conspiracy to commit murder. A judge sentenced him to death. Griffin filed two post-conviction

petitions in Illinois state courts, to no avail. He then filed a petition for writ of habeas corpus in the district court, claiming that the State knowingly used perjured testimony and that his sentencing counsel was ineffective. The district court denied his petition but granted a certificate of appealability on these two claims. Griffin appealed, and we grant the petition on the *Strickland* claim only.

I. Background

A. Underlying Criminal Case

The recitation of the facts pertaining to Griffin's underlying conviction is taken from the Illinois Supreme Court's opinion in *People v. Griffin*, 592 N.E.2d 930, 931-32 (Ill. 1992) (*Griffin I*), *cert. denied*, 507 U.S. 924 (1993):

On June 21, 1984, the body of Carl Gibson was found near the 73rd Street exit ramp off of the Chicago Skyway. He had been shot four times at close range several hours earlier.

At the time, the Chicago Police Department and the State's Attorney's Office of Cook County were involved in an investigation of a major drug operation located on Chicago's south side that targeted Charles Ashley, a drug dealer whose activities yielded an estimated $3 million annually. Gibson was employed in Ashley's drug operation.

Appendix A

Darryl Moore, who was also employed by Ashley's drug operation, was arrested in late July 1984 on drug and unlawful use of weapons charges. While in jail, Moore contacted Detective Michael Pochordo who was with the Violent Crimes Division of the Chicago Police Department. Moore claimed to have information about the Gibson murder. Pochordo set up a meeting with Moore and representatives of the State's Attorney's Office. At a meeting on August 7, 1984, Moore advised members of the State's Attorney's Office that Griffin was involved in the Gibson murder. So the State's Attorney's Office requested permission for a consensual overhear device for use in Moore's contact with Griffin. The Circuit Court of Cook County approved an application for the overhear device, and on August 9, 1984, a tape-recording device was assembled at the State's Attorney's Office and used to record a telephone conversation between Moore and Griffin. Moore recognized Griffin's voice because he had known him through their "enforcer" work and had spoken to him at least 100 times. During this taped conversation, Griffin implicated himself in the Gibson murder.

Griffin was arrested and taken into custody. James Allen was also arrested in connection with the murder, and the two were placed in separate interview rooms. Assistant State's Attorney Neil Cohen was introduced to Griffin and read him his *Miranda* warnings. Griffin asked whether Cohen had talked to Allen and, upon hearing that Allen had given a statement, Griffin waived his *Miranda* rights and confessed to his participation in Gibson's murder. Griffin's confession revealed the

following facts: Ashley approached Griffin and asked him if he would kill Gibson for $2,500. Ashley wanted Gibson eliminated because he suspected that Gibson was secretly passing information to police. The offer was made and accepted in the presence of Allen. Griffin and Allen went to Moore's apartment to obtain a gun. Moore was one of Ashley's "enforcers" and he and Griffin had worked together in the past. Moore gave Griffin a .38-caliber revolver, and Griffin and Allen left the apartment and took Griffin's family members home. Allen waited in the car while Griffin entered the home. Then Griffin returned to the car accompanied by Gibson. Allen drove, Gibson sat in the passenger seat, and Griffin sat in the back seat. Allen drove onto the Chicago Skyway at 89th Street, proceeding southbound. When he reached a toll plaza, he turned around and proceeded northbound. While driving northbound on the Skyway, Griffin shot Gibson four times in the back of the head with a .38-caliber revolver. Allen then exited the Skyway at 73rd Street and stopped the car on the exit ramp. Griffin pulled Gibson's body out of the car. The next day Griffin gave the murder weapon to Ashley. Griffin and Allen disposed of the rental car used in the murder. Ashley paid Griffin in cash and cocaine.

Griffin was indicted along with codefendants Ashley and Allen for conspiracy to commit murder, solicitation to commit murder, and murder. Prior to trial, the court found Griffin fit to stand trial and denied his motion to suppress evidence seized pursuant to a search warrant. In June 1985, all three defendants were tried simultaneously—Griffin and Allen by separate juries,

and Ashley by Judge Earl Strayhorn. The prosecution's chief evidence against Griffin consisted of the taped telephone conversation between Griffin and Moore; an unsigned, court-reported statement of Griffin; Assistant State's Attorney Cohen's testimony about his conversations with Griffin; and Moore's testimony.

B. Additional Facts

The prosecutor offered into evidence the tape recording of the August 9, 1984, telephone conversation between Moore and Griffin. Griffin objected to the tape's admission. Though he now argues that the tape is largely unintelligible, he did not object on that ground when opposing the tape's admission. Indeed, the Illinois Supreme Court found that at the time of admission, Griffin did not object on audibility grounds, *Griffin I*, 592 N.E.2d at 934, and our own review of the trial transcript confirms the correctness of that finding. And the trial court, having heard the transcription of the tape-recorded conversation, apparently found the tape sufficiently intelligible and admitted it. The tape recording of Griffin and Moore's telephone conversation was played for the jury.

Griffin's unsigned statement, taken in the police interview room on August 9, 1984, in the presence of Assistant State's Attorney Cohen and Detective Pochordo and reported by a court reporter, Joseph A. Szydist, was read to the jury. The court reporter testified that the statement was an accurate transcription of the conversation between Cohen and

Griffin. According to that statement: Griffin said that on June 20, 1984, Chuck Ashley asked him to kill one of his workers, Gibson, for $2,500. Ashley told Griffin that he wanted Gibson killed because Gibson was a snitch. Griffin accepted the offer, which was made and accepted in the presence of Allen a/k/a "Head." Griffin and Allen went to the apartment of Moore (a/k/a Kareem) to get a revolver. Griffin asked Moore for a gun, but didn't tell him what it was for. Moore gave Griffin a loaded .38 special revolver. Griffin and Allen took Griffin's family home and Griffin returned to the car with Gibson. Griffin and Gibson got into the rental car that Allen was driving. Gibson was in the front passenger seat, and Griffin got in the back seat. They drove to the Skyway, turned around, and then Griffin killed Gibson with the gun, shooting him four times in the back of the head. They got off the Skyway at the 73rd exit ramp and Griffin pulled the body out. Griffin gave the gun he had used to Ashley and the rental car was dumped. Ashley paid Griffin $1,500 in cash and $1,000 worth of cocaine. Earlier that day (August 9, 1984) Griffin received a phone call from Kareem (Moore) and talked about the contract on Gibson.

At trial Assistant State's Attorney Cohen testified about the recorded telephone conversation between Griffin and Moore; Cohen had listened to the conversation as it took place. Cohen stated that throughout the recorded conversation, the person talking with Moore responded to the name "Grif." Cohen also testified that the person who spoke to Moore had a "low, gruff voice" and that it was the voice he heard

speaking at the end of the tape when the police entered and arrested Griffin. Raymond Stockholm, the supervising investigator with the State's Attorney's Office, corroborated Cohen's testimony that Moore addressed the person to whom he spoke as "Grif"—and "several times" at that. Cohen testified that when he spoke to Griffin on the day of his arrest, he recognized Griffin's voice as the same voice he had heard during the recorded conversation with Moore. According to Cohen, Griffin acknowledged that he discussed the Gibson killing with Moore on the phone earlier that day.

Cohen further testified regarding Griffin's oral and written statements. Cohen stated that on the day of Griffin's arrest, he had a conversation with Griffin regarding Griffin's participation in the Gibson murder. Cohen first advised Griffin of his *Miranda* rights and then asked if he would like to talk. Griffin asked Cohen if he had been talking to "Head" (Allen), and Cohen answered that they had been talking about the Gibson murder. Griffin agreed to talk. Griffin told Cohen that he had killed Gibson. More specifically, Cohen testified that Griffin advised him of a June 20, 1984 conversation with Chuck Ashley in which Ashley asked him to kill two people, including Gibson, in exchange for $2,500, and Griffin agreed to do it. According to Cohen, Griffin told him that Allen was present at the time. Cohen stated that Griffin said he and Allen met with Moore; Allen and Griffin picked up some people and then dropped them off at an apartment. Allen waited in the car while Griffin got out. Griffin returned with Gibson who got in the front seat and Griffin got into the back. Cohen testified that

Griffin told him that Allen drove onto the Skyway, first going southbound, then northbound, and between the toll plaza and the 73rd Street exit ramp, Griffin shot Gibson four times in the back of the head. Griffin stated that they dropped the body on the 73rd Street exit ramp. According to Cohen's testimony, Griffin said he killed Gibson because Ashley paid him to do it, giving him $1,500 in cash and $1,000 worth of cocaine. Following their conversation, Cohen asked Griffin if he would be willing to give a written court-reported statement. Griffin agreed to do so. Cohen said that after he read the statement to Griffin, he asked Griffin to sign it. But Griffin asked to speak to an attorney and did not sign the statement.

At trial Moore testified that both he and Griffin worked for Ashley: Griffin in "enforcing"—meaning beating and killing people for money—and Moore in drug selling, enforcing, and doing contract work. Moore acknowledged that he had been a contract killer since 1980 and had been convicted of rape and two robberies. Moore stated that he had known Griffin for "quite a while" and had been doing work with him for "a few weeks." Moore said that in June 1984, Ashley told Moore he wanted him to kill Gibson who ran the day-to-day operations of Ashley's drug operation. Moore testified that Ashley offered him some money to kill Gibson; Moore tried to get Ashley to pay him more but without success, so Moore suggested that Griffin might be interested in the contract on Gibson. According to Moore, on June 20, 1984, Griffin came to his house and told him he had a contract for Gibson from Ashley and

asked Moore to go in on it with him. Moore declined. Moore testified that the next day, June 21, Griffin and Allen came over to his house and Griffin told Moore that he had a contract out from Ashley and it was easy; Griffin described how he tricked Gibson out of the house and shot him while Allen was driving on the Skyway.

Moore also testified about his tape-recorded telephone conversation with Griffin on August 9, 1984 from the State's Attorney's Office.[1] Moore stated that he called the person to whom he spoke "Grif" and that person never said "I'm not Grif." Moore testified that during that conversation, the other person told Moore about how he and Allen had killed Gibson, the car and gun they had used, and Ashley's contract on Gibson.

Moore acknowledged that in exchange for his testimony at trial, the State's Attorney's Office agreed to dismiss a pending gun case and drug case, allow him to plead guilty to a sentence of time served, reduce an armed robbery charge to robbery, place him in the witness protection program, and relocate him after he testified at trial. On cross-examination, Moore initially denied that he had received any money since August 1, 1984 until the time of his testimony in connection with the case or his participation in it. But when pressed

1. In his brief, Griffin says that Moore testified about "the largely unintelligible taped telephone conversation." Moore testified about this conversation but never described the tape as unintelligible. Nor did anyone else at trial, not even the trial judge who listened to the tape recording before ruling on its admissibility, describe it as unintelligible.

about whether he had received money from the State's Attorney's Office, Moore admitted that he had received money for "the relocation thing" from "Mr. Wadas" (an Assistant State's Attorney). Subsequently, Moore backpedaled and offered that he hadn't received any money; he said that checks were made out to "various locations." Several times Moore denied receiving any money, including from police officers.

The jury found Griffin guilty on all counts. Griffin waived his right to a sentencing jury for both the eligibility and sentencing stages. Judge Strayhorn found Griffin death eligible. The court asked the attorneys if they were ready to proceed with the aggravation/mitigation phase of sentencing. Defense counsel responded, "Not really" and sought a continuance for filing posttrial motions. The motion for continuance was denied, and the State offered its case in aggravation: "all of the evidence that the Court heard during the trial of this case" and certified copies of Griffin's seven prior convictions.

Griffin called two witnesses in mitigation: Griffin and Ida Powe—a witness with whom Griffin's counsel had never spoken "until just a few minutes" before she testified. Griffin testified about his drug addictions and prior convictions and denied killing anyone. He also stated that when he was a teenager he had been placed in a mental institution for attempted suicide and depression and had escaped on two occasions. Powe testified that she had known Griffin since 1974 and had never known him to commit any type of violence against

another person. She did not think he was capable of murder.

In closing argument, Griffin's counsel emphasized that there was no eyewitness to the Gibson murder and no physical evidence. Counsel argued that the only evidence was the testimony "of a contract killer who was thoroughly impeached"; "a tape recording"—on which Powe did not recognize Griffin's voice; and Griffin's unsigned statement, which in counsel's opinion "was really questionable." Griffin's counsel later stated (in an affidavit submitted with Griffin's post-conviction petition) that he had never interviewed Powe and had not known of her existence until the sentencing hearing. Powe's affidavit indicated that during the sentencing proceedings, Griffin's counsel approached the gallery seeking persons to testify on Griffin's behalf, and she essentially volunteered to do so.

Judge Strayhorn sentenced Griffin to death. Thereafter, Griffin's sentence was commuted to life imprisonment. This did not moot the habeas petition; Griffin may seek a lower sentence. *See Simpson v. Battaglia*, 458 F.3d 585, 595 (7th Cir. 2006).

C. Post-Conviction Proceedings

Griffin filed two post-conviction petitions. In the first, which was filed while his direct appeal was pending, Griffin claimed that the State knowingly suborned perjury from key prosecution witness Moore. On August 19, 1986, Sam Adam, counsel for Griffin on direct appeal

(Adam had represented Ashley at trial), videotaped Moore recanting his trial testimony and admitting that he committed perjury at Griffin's trial. The statement indicated that Moore agreed with Detective Pochordo to lie at Griffin's trial in exchange for money. Moore claimed that Pochordo and members of the State's Attorney's Office told him what to say. Moore stated that he was given large cash payments to live a lavish lifestyle and that he was given money to buy the catering truck he wanted in exchange for his testimony. Adam also obtained a transcript of Moore's testimony given August 20, 1987, in the Circuit Court of Cook County in *Illinois v. Freeman* in which Moore testified that he had lied in the Gibson trial and that he had been paid to testify as a State witness. Griffin requested an evidentiary hearing. Judge Strayhorn found "no constitutional imperfections" in the case and denied his petition without a hearing. On appeal, Griffin argued this was error. The Illinois Supreme Court affirmed Griffin's conviction, sentence, and the denial of his post-conviction petition. *Griffin I*, 592 N.E.2d 930. The state supreme court found that the trial court did not abuse its discretion in ruling on the habeas petition without holding an evidentiary hearing. *Id.* at 933.

In his second post-conviction petition, Griffin brought, among others, a claim under *Strickland v. Washington*, 466 U.S. 668 (1984). Griffin argued that his counsel was ineffective for failing to investigate and present at sentencing the following mitigation evidence: (1) his school, mental health, and prison records; (2) a psychological evaluation; and (3) testimony from several

relatives. (The original petition included affidavits from five relatives; Griffin apparently supplemented his petition with the addition of six more affidavits from relatives and friends. This included an affidavit from Powe that gave greater insight into Griffin's personal life than her sentencing testimony had.) This second petition was supported by the affidavit of George Howard, Griffin's counsel at both trial and sentencing. Howard's affidavit stated that prior to the capital sentencing hearing, he "made no attempt to investigate for mitigating evidence," "the only defense against the death penalty [he] considered and presented was residual doubt of guilt," and "there was no strategic reason" for his failure to investigate for mitigating evidence. Judge Strayhorn dismissed the petition without a hearing.

The Illinois Supreme Court affirmed. *People v. Griffin*, 687 N.E.2d 820 (Ill. 1997) (*Griffin II*), *cert. denied*, 524 U.S. 956 (1998). The court recognized that "counsel has a duty to investigate potential sources of mitigation evidence, or to have a reason not to make such an investigation" and stated that the "decision whether to present a particular witness is generally a strategic choice which cannot support a claim of ineffective assistance of counsel." *Id.* at 833 (citations omitted). Then, relying on the special concurrence in Griffin's prior appeal, the state supreme court found that "counsel's performance was clearly a strategic decision." *Id.* (The special concurrence said that "[a]pparently believing that the defendant's personal history provided little, if any, mitigation, counsel chose

to argue to the sentencing judge that the evidence of the defendant's guilty . . . should not form the basis for a death sentence." *Griffin I*, 592 N.E.2d at 938 (Miller, C.J., specially concurring).) The Illinois Supreme Court added that "information on defendant's personal history was included in the presentence investigation report. Defense counsel cannot be faulted for failing to introduce mitigation evidence that was already contained in the report." *Griffin II*, 687 N.E.2d at 834. The Illinois Supreme Court's decision does not explicitly mention Howard's affidavit. (Respondent does not dispute Griffin's assertion that his second post-conviction petition was in fact supported by Howard's affidavit.)

The Illinois Supreme Court determined that Griffin had not shown prejudice, finding "no reasonable probability that, absent trial counsel's alleged deficiencies, the sentencer would have found that the mitigating circumstances preclude the imposition of the death penalty." *Id.* The court cited Griffin's confession to having executed Gibson for money and narcotics, which was corroborated by other trial evidence, and Griffin's lengthy criminal history. According to the court, the proffered mitigation evidence was either "cumulative to evidence already introduced at trial" or "not inherently mitigating." *Id.* The Illinois Supreme Court said that information about Griffin's school, mental health, and prison records was contained in the presentence investigation report and Griffin's mitigation testimony, that the sentencing court was aware of Griffin's mental condition through testimony

at the fitness hearing, and that the testimony from Griffin's family members would have gone to his troubled, disadvantaged childhood, which was presented in the presentence report. *Id.* Thus, the state supreme court concluded that the proffered testimony "would have been cumulative and . . . not inherently mitigating." *Id.* Finally, the Illinois Supreme Court relied on the fact that the post-conviction court, which had been the sentencing court, stated that the "proffered evidence would not have changed defendant's sentence." *Id.* The United States Supreme Court denied certiorari. *Griffin v. Illinois*, 524 U.S. 956 (1998).

In August 1998, Griffin filed a petition for writ of habeas corpus in the district court, claiming that the State knowingly used the perjured testimony of a key witness and that his sentencing counsel was ineffective in failing to conduct an investigation into and present any mitigation evidence. The district court held a hearing on both claims on several days from 2002 to 2004 at which Moore testified that he lied at Griffin's trial when he said that Griffin was responsible for Gibson's murder. According to Moore, Detective Pochordo fed him all the information about the Gibson murder. Moore denied that Griffin was the person to whom he was speaking during the tape-recorded conversation played at Griffin's trial; Moore also denied that the conversation was about the Gibson murder. Moore testified that he had received thousands of dollars from the Illinois State's Attorney's Office and that he had lied to Griffin's jury about how much he had received or was to receive as well as the purpose of the money. Moore said that

after Griffin's conviction, he and his girlfriend received several thousand dollars each, which was confirmed by the State's Attorney's Office's records. Moore claimed that the prosecutors gave him money after he testified "for lying."

Financial records from the State's Attorney's Office showed that Moore received cash and benefits totaling in excess of $66,000. There was evidence that the money was spent on luxury hotel rooms, apartment, car rentals, and payment of dental expenses for Moore's girlfriend. Moore claimed that the State paid rent for apartments that were narcotics houses. He testified that he was never part of the witness protection program, that he didn't need protection, and that the State's Attorney's Office called the benefits "witness protection" to justify giving him the money. At the time of the evidentiary hearing, Moore was serving a sixty-year sentence for aggravated criminal assault along with shorter concurrent sentences for aggravated kidnapping and robbery. He admitted that he picks and chooses when to tell the truth and said that he "despised" the State's Attorney's Office.

The district court heard testimony or received stipulations from Franklin Freeman; Detective Pochordo; the Assistant State's Attorneys who prosecuted Griffin's criminal case; their supervisors; George Howard; and others. Freeman testified that Moore told Freeman he was working for Pochordo and that Pochordo would believe everything they told him. Pochordo confirmed that following the Gibson trial,

Moore was neither particularly concerned about his safety nor particularly interested in the witness relocation program. Pochordo admitted that Moore asked him for $200 once, and Pochordo gave it to him. But Pochordo denied knowledge that Moore received any money from the State's Attorney's Office.

The district court also heard testimony about the procedures for disbursing money from the State's Attorney's Office's relocation unit. The State's witnesses testified that it would be unusual to provide large cash payments such as $2000 to relocation witnesses. The witnesses testified that the relocation program paid for housing and preferred to use apartments, but would use hotels if necessary. The evidence was that the relocation program did not typically include medical expenses for witnesses or assistance to purchase or rent a car. The parties stipulated that former Cook County prosecutor William Hibbler (now a district judge in the Northern District of Illinois) would testify that in the mid-1980s there were no guidelines as to how the relocation program was to be administered, benefits were decided on a case-by-case basis, and it was "very possible" that no one person kept track of the expenditures on Moore. Each state prosecutor involved in Griffin's criminal trial testified that he did not promise Moore money in exchange for his testimony; each prosecutor expressed a belief that Moore was in danger and that the money spent on Moore's behalf was intended to relocate him in order to protect him; and each testified that he believed Moore's trial testimony was true.

The district court denied Griffin's habeas petition. The court found that from August 1984 to June 1986, the State's Attorney's Office spent over $66,000 in relocation expenses for Moore and his dependents, the majority of which was paid after Moore testified. Although the court found that one could infer that "the way the money was spent on Moore was inconsistent with witness protection," the court credited the prosecutors' testimony that "the money was paid to relocate and to protect Moore from potential threats"—they were not paying Moore for his testimony. The court relied on evidence that when the payments were made, the State's Attorney's Office had no guidelines. The court also credited the prosecutors' and Detective Pochordo's testimony that they believed Moore's trial testimony was true. And the court found that Griffin failed to prove that Moore perjured himself or that Pochordo or the prosecutors knew it. The district court therefore concluded that Griffin had not carried his burden of proving a deprivation of due process.

With respect to the *Strickland* claim, the district court found, based on Howard's affidavit and testimony at the hearing, that he "made no investigation for mitigating evidence," he "had no good reason" not to conduct such an investigation, and his failure to do so did not meet the objective standards of reasonableness. However, deferring to the "state court finding of fact" that Griffin's sentence would not have been different had the mitigation evidence been presented, the district court concluded that Griffin suffered no prejudice. This "finding of fact" was based on the sentencing judge's

statement that the proffered mitigation evidence would not have changed Griffin's sentence. In a footnote, the district court added that it would reach the same conclusion absent deference to the state court finding, but the court did not expand on this conclusion. The district court entered judgment, denying Griffin's habeas petition, and Griffin appealed.

Griffin sought a certificate of appealability as to two claims: (1) that he was denied due process of law when the State knowingly presented and failed to correct false testimony of key witness Moore, and (2) that he was denied effective assistance of counsel at his capital sentencing hearing when his attorney, who conducted virtually no investigation, failed to present substantial, available mitigating evidence. The district court issued a certificate of appealability as to these two claims.

II. Analysis

Griffin raises the two certified claims on appeal.

A. Standard of Review

We review the district court's decision to deny Griffin's habeas petition de novo and we review its factual findings for clear error. *Ebert v. Gaetz*, 610 F.3d 404, 411 (7th Cir. 2010). Our review is constrained by the Antiterrorism and Effective Death Penalty Act of 1996, specifically 28 U.S.C. § 2254(d). A federal court may grant habeas relief only if the state courts' adjudication of Griffin's claim "was contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d). Though Griffin mentions the "contrary to" clause of § 2254(d), his claims are limited to the "unreasonable application" of federal law and the "unreasonable determination of the facts."

"A state court unreasonably applies federal law if it identifies the correct legal principle but unreasonably applies it to the facts of the case, or if it unreasonably refuses to extend a principle to a context in which it should apply." *Goudy v. Basinger*, 604 F.3d 394, 399 (7th Cir. 2010) (citing *Williams v. Taylor*, 529 U.S. 362, 407 (2000)). The state court's application of federal law must have been both incorrect and unreasonable, "that is, lying well outside the boundaries of permissible differences of opinion." *Id.* (quoting *Tolliver v. McCaughtry*, 539 F.3d 766, 774 (7th Cir. 2008)). And a "decision involves an unreasonable determination of the facts if it rests upon fact-finding that ignores the clear and convincing weight of the evidence." *Id.* We deferentially review the decision of the last state court to address Griffin's petition on the merits. *Ebert*, 610 F.3d at 411. The state court's factual findings are presumed correct unless Griffin rebuts that presumption with clear and convincing evidence. *Id.; see also* 28 U.S.C. § 2254(e)(1). We review the post-conviction court's decision with respect to the *Napue* claim and the Illinois Supreme Court's decision in *Griffin II* with respect to the *Strickland* claim.

B. *Napue* Claim

The Supreme Court has held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *see also United States v. Agurs*, 427 U.S. 97, 103 (1976) (holding prosecutor has an obligation to provide defense with exculpatory information even when no request has been made); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (new trial required where government failed to correct false testimony by key witness about a benefit he received for testifying and the prosecutor should have been aware of the falsehood). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269. The constitutional violation is not cured by "the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner." *Id.* at 270. When a conviction is obtained through the knowing use of false testimony, it must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103; *see also Giglio*, 405 U.S. at 154; *Napue*, 360 U.S. at 271. Thus, a new trial is required if a petitioner establishes that (1) the prosecution presented false testimony or failed to disclose that false testimony was used to convict, (2) the prosecution knew or should have known that the testimony was false, and (3) there is a reasonable likelihood that the testimony could have affected the

jury's judgment. *Agurs*, 427 U.S. at 103. Even if we assume that Griffin could establish the first two prongs of this standard, he cannot show a reasonable likelihood that Moore's false testimony could have affected the judgment of the jury.

Griffin submits that he was prejudiced by Moore's testimony because there was no physical evidence or eyewitness testimony linking Griffin to Gibson's murder and Moore was the key prosecution witness upon which his conviction largely depended. According to Griffin, take away Moore's testimony and the State is merely left with Griffin's unsigned statement and the recording of his consensual overhear with Moore, which was unintelligible and "translated" by Moore.

Griffin criticizes his written statement because it was unsigned. But the absence of his signature does not render his written statement useless evidence. Griffin cannot refute that in his written statement he admitted to having killed Gibson—shooting him four times in the back of the head—because Ashley put a contract on Gibson and Griffin accepted it. Griffin also errs in claiming that his unsigned statement was the sole piece of other evidence against him. The court reporter who took Griffin's written statement testified at trial that the statement was an accurate transcription of the conversation between Cohen and Griffin. And Assistant State's Attorney Cohen testified extensively about Griffin's oral and written statements in which he confessed to killing Gibson for Ashley. According to Cohen, after being advised of his *Miranda* rights, Griffin

agreed to talk to Cohen about the Gibson murder and admitted that he had killed Gibson. We should add that Cohen's testimony establishes that Griffin's written statement and oral statement were consistent on the facts.

And there's more. Cohen also testified about the telephone conversation between Griffin and Moore—Cohen was listening in on the entire conversation. Both Cohen and investigator Stockholm, who conducted the overhear, testified that the person talking with Moore responded to the name "Grif." Cohen stated that when speaking with Griffin after his arrest, Cohen recognized Griffin's voice as the one he heard during the recorded conversation with Moore. And Cohen testified that during his conversation with Griffin after his arrest, Griffin acknowledged having discussed the Gibson killing with Moore on the phone earlier that day. Neither Cohen, Szybist, nor Stockholm were seeking any benefits from the State in testifying against Griffin. *See United States v. Williams*, 81 F.3d 1434, 1439-40 (7th Cir. 1996) (holding no abuse of discretion to deny defendants' request for new trial based on government's knowing use of perjured testimony and concealment of evidence favorable to the defense where tainted testimony was corroborated by law enforcement).

Griffin relies on *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995), in which we held that the district court did not abuse its discretion by granting new trials where the government had knowingly used perjured testimony and failed to disclose exculpatory evidence in violation

of *Brady v. Maryland*, 373 U.S. 83 (1963). The government's case in *Boyd* "depended heavily on" the testimony of the witnesses whose testimony the defendant alleged was perjured. And the district judge found that the prosecutors' misconduct was "far more serious than" the typical case in which a prosecutor is accused of knowingly using false testimony or failing to disclose exculpatory material. *Id.* at 241. We did not dispute that assessment. *Boyd* is an extreme example of gross prosecutorial misconduct; Griffin's is nothing like it. Even if we assume that Moore was lying under oath at Griffin's trial, *Boyd* does not require a new trial in this case.

As we observed in *Boyd*, "[t]he knowing use of perjured testimony is not an automatic ground for a new trial." *Id.* at 243. Although Moore's testimony was important, it was not essential to the State's case given all the other weighty evidence against Griffin. As for the taped telephone conversation between Moore and Griffin, the record does not bear out Griffin's suggestion that Moore had to translate the recording. Sure, Moore testified about what he and Griffin said during their telephone conversation, but he did not interpret the words or sounds on the tape as it was played for the jury. Though the district court characterized the tape as unintelligible, there is no hint in the trial record that the tape was unintelligible, not even in part, approximately twenty years before when it was played at trial. Griffin objected to the tape's admission, but unintelligibility was not one of the grounds he raised. And we know from the record that Judge Strayhorn

listened to the tape before admitting it and explained the legal standards that govern the admissibility of voice identification and sound recordings—his oral ruling on the tape's admissibility spans several pages of transcript and references several state court decisions—which suggest that the tape was sufficiently intelligible. *Cf. People v. Rogers*, 543 N.E.2d 300, 303 (Ill. App. Ct. 1989) (stating that "a partially inaudible tape recording is admissible unless the inaudible portions are so substantial as to render the recording untrustworthy as a whole").

The fact that the State lavished Moore with benefits prior to and after his testimony suggests that Moore's testimony was valuable to the State in its case against Griffin (as well as other cases). But Moore's testimony was in no way the only or even strongest piece of evidence against Griffin. The remaining evidence establishes that Griffin's conviction was secure even if the jury completely discredited Moore's testimony. The district court correctly denied habeas relief on the *Napue*false testimony claim.

C. *Strickland* Claim

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth the legal principles governing ineffective assistance of counsel claims. Under *Strickland*, a petitioner must show both that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that the deficient performance prejudiced his

defense. *Strickland*, 466 U.S. at 688-93; *Ebert*, 610 F.3d at 411. A state court's conclusion whether counsel's assistance was effective and whether counsel's performance prejudiced the defendant are mixed questions of law and fact which we review de novo. *Strickland*, 466 U.S. at 698; *Allen v. Chandler*, 555 F.3d 596, 600 (7th Cir. 2009). Respondent concedes that Howard's failure to conduct any investigation into mitigation evidence was unreasonable— and it was—so we focus our attention on whether Griffin has shown prejudice.

With respect to *Strickland*'s prejudice component, a petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Allen*, 555 F.3d at 600. When challenging his sentence, a petitioner must show that but for counsel's errors, there is a reasonable probability that he would have received a different sentence. *Strickland*, 466 U.S. at 695; *see also Porter v. McCollum*, 130 S. Ct. 447, 453 (2009). Courts assess that probability by evaluating " 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and reweigh[ing] it against the evidence in aggravation.' " *Porter*, 130 S. Ct. at 453-54 (quoting *Williams*, 529 U.S. at 397-98). We review for reasonableness the state court's determination that such a probability does not exist. *Ellison v. Acevedo*, 593 F.3d 625, 633 (7th Cir.

2010). The petitioner's bar is set high, and " 'only a clear error in applying *Strickland* will support a writ of habeas corpus.' " *Byers v. Basinger*, 610 F.3d 980, 988 (7th Cir. 2010) (quoting *Allen*, 555 F.3d at 600).

Griffin has cleared the bar. Had Griffin's counsel conducted an investigation into mitigation and presented the proffered mitigation evidence, the sentencing court "would have learned of the 'kind of troubled history [the Supreme Court has] declared relevant in assessing a defendant's moral culpability.' " *Porter*, 130 S. Ct. at 454 (quoting *Wiggins v. Smith*, 539 U.S. 510, 535 (2003)). This case falls in line with those cases in which the Supreme Court has concluded that counsel's failure to investigate and present proffered mitigation evidence prejudiced the petitioner. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390-93 (2005) (mitigation case built on evidence that petitioner was raised in a "slum environment," quit school at 16, and had a serious drinking problem; test results pointed to schizophrenia and other disorders; test scores showed third-grade level of cognition despite nine years of school; his parents were severe alcoholics who drank constantly; there was no expression of parental love, affection or approval, only yelling and verbal and physical abuse; petitioner lived in a house with no plumbing, slept in an attic with no heat; his mother went missing frequently for several weeks at a time; and he suffered from fetal alcohol syndrome); *Wiggins*, 539 U.S. at 535 (petitioner suffered "severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother," physical torment, sexual

molestation, rape in foster care, homelessness, and diminished mental capacities which created a reasonable probability the jury would have reached a different sentence); *Williams*, 529 U.S. at 395-96 (mitigation evidence included records of "nightmarish childhood," involving severe and repeated beatings by petitioner's father and criminal neglect by both parents, placement in an abusive foster home during parents' incarceration, and petitioner was "borderline mentally retarded" and did not go beyond sixth grade). Had Griffin's counsel investigated and presented the proffered evidence, Judge Strayhorn would have learned of Griffin's father's alcoholism and abusiveness, Griffin's mother's absences from the home, and the circumstances of his mother's death and how it affected him, including the increasing mental abuse from his father. The judge would have heard about Griffin's diagnosis of "schizophrenic reaction, chronic undifferentiated type—with suicidal tendencies" and other details of his mental health and drug addictions, his two attempts at suicide, and his attempts at self-mutilation. The judge also would have heard about Griffin's good acts, including caring for sick and dying family members—even for his father.

The Illinois Supreme Court concluded that there was no reasonable probability that absent counsel's alleged errors, the sentencing court would have found that the mitigating evidence precluded the death penalty. The first problem with that assessment is that it is unclear to us how much weight the state supreme court gave to Judge Strayhorn's statement that the introduction of the proffered evidence would not have

changed Griffin's sentence. Though we, and the Illinois Supreme Court, may give weight to such a statement, it is not conclusive. *Raygoza v. Hulick*, 474 F.3d 958, 964 (7th Cir. 2007) (stating that where the same judge presides over both the postconviction proceeding and trial, "we cannot accept as conclusive the judge's statement that the new evidence would not have made any difference"). The question is not whether a particular judge would have imposed a different sentence, but rather whether there was a "reasonable probability" that the sentence would have been different. In assessing that probability we conduct an objective evaluation of the evidence. *Id.* at 964-65.

Another problem: the Illinois Supreme Court gave consideration to the seriousness of Griffin's offense, the corroboration of Griffin's confession by other evidence, and his lengthy criminal history, but it did not properly evaluate the totality of the mitigation evidence and reweigh it against the aggravation evidence as it must. *See, e.g.*, *Porter*, 130 S. Ct. at 453-54. After all, the state supreme court thought the proffered mitigation evidence was merely cumulative and not inherently mitigating. But most of the proffered evidence was neither. And the court's determination to the contrary was unreasonable. *See Hall v. Washington*, 106 F.3d 742, 752 (7th Cir. 1997) (Illinois Supreme Court's view that proffered mitigation evidence was mere character evidence and cumulative was unreasonable finding). The state supreme court thought that the information about Griffin's personal history was included in the presentence report. *See Griffin II*, 687 N.E.2d at 834

("We add that information on defendant's personal history was included in the presentence investigation report."). *Some* information about Griffin's personal history was in the report, but the report was an incomplete and at times inaccurate reflection of Griffin's tragic personal history. The presentence report referenced Griffin's representation of a "normal childhood and good relationships with his parents . . . ." His childhood was anything but normal.

Respondent relies on *Lear v. Cowan*, 220 F.3d 825 (7th Cir. 2000), in arguing that there is no reasonable probability that the omitted evidence would have changed Griffin's sentence. Like Griffin, Lear was sentenced to death and argued ineffective assistance of counsel at sentencing. Lear specifically argued that he was entitled to the assistance of a "mitigation specialist" who would conduct a thorough investigation into his past to find mitigation evidence. *Id.* at 829. We determined that the denial was harmless because the evidence in aggravation was "compelling": Lear had committed two prior murders, and the murder for which he was sentenced was "entirely gratuitous [in] character." *Id.* The only additional mitigation evidence uncovered was that Lear was a good student, had a somewhat belowaverage I.Q., used cocaine, and had a mental disorder. *Id.* The mitigation evidence that Griffin offers is markedly different—nothing hints that Lear had as horrendous a childhood as Griffin— and there is a reasonable probability that it would have made a difference in Griffin's sentence.

The Illinois Supreme Court's determination that Griffin was not prejudiced by his counsel's deficient performance at sentencing was an unreasonable application of *Strickland*.

III. Conclusion

We REVERSE the district court's judgment in part and remand with instructions to grant Griffin's habeas petition on the *Strickland* claim only and allow the State 120 days within which to resentence Griffin. 9-22-10

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION DATED JULY 29, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 5024
Judge James B. Zagel

UNITED STATES OF AMERICA ex rel.
HENRY GRIFFIN,

Petitioner,

v.

JOSEPH MATHY, Assistant Warden,
Pontiac Correctional Center,

Respondent.

MEMORANDUM OPINION AND ORDER

This federal court proceeding began with Petitioner, under sentence of death, seeking the writ of habeas corpus. He filed in August 1998.

After the petition was filed it did not follow the ordinary course. During the earliest stages, Petitioner's counsel, Richard Cunningham, was slain by his own

mentally troubled son in March 2001. He was an able and distinguished lawyer who served many inmates under sentence of death. His demise significantly slowed the progress of the case.

This was so because resolution of some of the claims, it appeared to me, could not be resolved without an evidentiary hearing.[1] While Petitioner did not make a claim of actual innocence, the allegations of his petition suggested that questions of innocence might be raised. To that end, I contacted Professor Lawrence Marshall of Northwestern University Law School to suggest that justice might be best served if the law school clinics could provide legal assistance to Petitioner. Eventually Professor Thomas Geraghty appeared for and represented Petitioner at various stages of the proceedings.

After counsel for both parties examined the voluminous records in this case and discovery disputes were resolved, the challenges to the verdict and sentence requiring a hearing were boiled down to two. An evidentiary hearing was held with respect to the claims that the prosecution had knowingly used the false testimony of a key witness and that defense counsel was constitutionally ineffective at the sentencing phase of the trial.

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1. The state post-conviction practice rarely requires evidentiary hearings because the postconviction petition is ordinarily heard by the trial judge who has seen and heard the evidence and the performance of counsel and others at trial.

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While the lawyers were doing their work, the Governor of Illinois commuted every death sentence imposed in Illinois courts. The effect of this was a delay in most, if not all, postconviction capital cases.

There were three major questions that had to be answered before a petitioner like Griffin would know how to proceed. First, was whether the commutation was within the Governor's power to grant to an inmate who had not requested a pardon.[2] The Supreme Court of Illinois held that such commutations were within the Governor's power. *People ex rel. Madigan v. Snyder*, 804 N.E.2d 546 (2004). Second, was whether a defendant whose conviction is reversed or vacated and remanded may be sentenced to death after a new trial. It was important for Petitioner to know the answer to this before deciding to press on with claims that might result in a new trial. The Supreme Court of Illinois held that there could be no death penalty after retrial. *People v. Morris*, 848 N.E.2d 1000 (2006). Third, does the commutation of the death sentence render moot a claim of ineffectiveness of counsel at sentencing, which was my initial view. The Court of Appeals held that the commutation does not moot that claim. *Simpson v. Battaglia*, 458 F.3d 585 (7th Cir. 2006). By mid-2006, the petitioner could safely decide to pursue the writ. In 2008, Petitioner formally moved for reconsideration of my decision that the counsel at sentencing claim was moot and I granted it.

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2. I assume Griffin falls within this class because pardon or commutation is rarely requested before other legal remedies are exhausted.

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Briefing was done in stages throughout this process and an evidentiary hearing was held as well. The matter became fully briefed in March of this year.

> The basic facts of the case are set forth in the opinion of the Supreme Court of Illinois:
>
> The body of Carl Gibson was discovered near the 73rd Street exit ramp off of the Chicago Skyway on the morning of June 21, 1984. He had been shot four times at close range several hours earlier. A homicide investigation ensued.
>
> At the time of the Gibson murder, the Chicago police department and the State's Attorney's office of Cook County were involved in "Operation Camelot" - an investigation of a major drug operation located on Chicago's south side. The investigation targeted the narcotics network of Charles Ashley, a drug dealer whose activities yielded an estimated $3 million annually. The victim was employed in Ashley's drug operation.
>
> Also employed by Ashley's drug operation was Darryl Moore, who was arrested in August 1984 on drug and unlawful use of weapons charges. While in jail, Moore contacted Michael Pochordo, a detective with the Violent Crimes Division of the Chicago police department. Moore informed Pochordo that

he had information concerning the Gibson murder and Pochordo set up a meeting with Moore and representatives of the State's Attorney's office. At a meeting on August 7, 1984, Moore supplied the State's Attorney's office with information concerning defendant's involvement in the murder. The information was sufficient for them to request permission for a consensual overhear device for use in Moore's contact with defendant. Application for the overhear device was approved by the circuit court of Cook County on August 8, 1984. On August 9, 1984, a tape-recording device was assembled at the State's Attorney's office, and Moore was instructed to call defendant. Moore recognized defendant's voice because he had known him through their "enforcer" work, and had spoken to him at least 100 times. During his taped conversation with Moore, defendant implicated himself in the murder of Carl Gibson.[3]

Defendant was subsequently arrested and transported to the Violent Crimes Division in Area I. James Allen was also arrested in connection with the incident, and the men were placed in separate interview rooms.

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3. The tape still exists but it is unintelligible. I accept, as I am bound to do, the state court's characterization of what was on the tape.

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Assistant State's Attorney Neil Cohen was introduced to defendant and read defendant his *Miranda* warnings. Defendant inquired as to whether Cohen had talked to Allen and, upon hearing that Allen had made a statement, waived his *Miranda* rights and confessed to his participation in Gibson's murder. Defendant's confession revealed the following facts.

Ashley approached defendant and asked him if he would kill Gibson for $2,500. Ashley said that he wanted Gibson eliminated because he suspected that Gibson was secretly passing information to police. The offer was made and accepted in the presence of James Allen. Defendant and Allen then proceeded to the apartment of Darryl Moore, to obtain a gun. Moore was a fellow "enforcer" for Ashley and he and defendant had worked together in the past. Moore gave defendant a .38 caliber revolver and defendant and Allen left the apartment and dropped off members of defendant's family at home.

Defendant returned from the family home to the car accompanied by Carl Gibson. Allen drove the car, Gibson sat in the passenger seat and defendant sat in the back seat. Allen drove onto the Chicago Skyway at 89th Street, proceeding southbound. When he

reached a toll plaza, he turned the car around and proceeded northbound. While driving northbound on the Skyway, defendant shot Gibson four times in the back of the head with a .38 caliber revolver. Allen then exited the Skyway at 73rd Street and stopped the car on the exit ramp. Defendant then pulled the body out of the car. The next day, defendant gave the murder weapon to Ashley. The rental car used in the slaying was disposed of by defendant and Allen. Defendant was paid by Ashley in cash and cocaine.

Subsequent to his confession, defendant was indicted with his codefendants Charles Ashley and James Allen, for conspiracy to commit murder, solicitation to commit murder and murder. Prior to trial, the court found defendant fit to stand trial and denied defendant's motion to suppress evidence seized pursuant to a search warrant. The case was tried before a jury in June 1985. Moore testified as part of the State's evidence against defendant. Additionally, Assistant State's Attorney Cohen testified regarding the defendant's oral and written confessions. The taped telephone conversation between Moore and the defendant was also admitted into evidence. Following presentation of the State's evidence, the defense called its only witness, Detective Pochordo. Pochordo

testified that he was initially contacted by Moore and that Moore had been an informant in 10 previous homicide cases, six of which had resulted in murder convictions to date. The jury found defendant guilty on all counts.

On November 17, 1989, defendant filed a post-conviction petition alleging that "substantial perjury" was employed to convict defendant and that the State's Attorney's office knew or should have known of the perjured evidence. Specifically, the petition alleged that Darryl Moore was paid $25,000 by the State's Attorney's office to lie at defendant's trial, and that Detective Pochordo's affidavit which supported the taped conversation was also a lie. Attached to the petition was a transcript of a video recording wherein Moore recanted his trial testimony and an excerpt of Moore's testimony at an unrelated trial. The petition requested an evidentiary hearing.

The video recording was taken on August 20, 1986, by defense attorney, Sam Adam. On the recording, Moore stated that his testimony at the defendant's trial was a lie. He further stated that his testimony was based on information he had received from Detective Pochordo and members of the State's Attorney's office. In particular, Moore had received a copy of James Allen's 16-page

statement made subsequent to his arrest for the murder. In return for his testimony, Moore stated that he was housed in a Holidome hotel with his fiancee, that his living expenses were paid for, and that he was provided with money to purchase a catering truck from which he could sell hot food. Moore testified that the money for his "lavish lifestyle" came from the State's Attorney's office.

On August 10, 1987, Moore was a key witness in another Cook County homicide case, *People v. Freeman*, No. 86-CR-2090. During his testimony, Moore stated that he had lied at defendant's trial, and had been paid to do so by Detective Pochordo and members of the State's Attorney's office.

People v. Griffin, 592 N.E. 2d 930, 931-932 (1992) (direct appeal and appeal of denial of the first post-conviction petition).

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I begin with the two issues that were the subject of the evidentiary hearing.

1. Ineffective Assistance of Counsel

A. Decisions Within the Reasonable Range of Competence

Petitioner was represented at trial and sentencing by George Howard, a well-known defender in criminal cases.[4] Howard anticipated that both guilt and sentence would be tried before the jury, but he had not prepared for the penalty phase. He thought that, by Petitioner's waiving the jury, he would be given some time to prepare. This was one of the reasons he recommended to Petitioner that he should waive the jury at the penalty phase. His other reason, which, unlike Petitioner's counsel, I find particularly credible, is that he believed that Judge Earl Strayhorn, a truly distinguished judge, would not readily impose the death penalty.[5]

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4. Based on reported cases, disciplinary records and reputation within the community of lawyers who practice in criminal cases, it is fair to say that Mr. Howard was well-known as a lawyer whose performances were erratic. He is thought to have done some good work and some poor work. He has been reprimanded and suspended from the practice of law in some courts, including the Court of Appeals. He is, according to the undisputed statement of petitioner's counsel, currently without license to practice in Illinois.

5. Judge Strayhorn said that "a judge is not society's avenging angel." This quote appeared in his obituary in the Chicago Tribune. In the record in this case Judge Strayhorn (Cont'd)

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During the death penalty eligibility phase, defense counsel did not challenge the evidence. After Judge Strayhorn found Petitioner eligible for the death penalty, he inquired whether defense counsel was ready to proceed on aggravation and mitigation. Mr. Howard said, "Not really, Judge because knowing very well that based upon the conviction and . . . the age of the defendant, that there wouldn't be any problem with satisfying the law relative to his eligibility, I would think, your Honor, that . . . as a result . . . of the jury's verdict and so forth that I . . . think we would like to do, at this point, is to set the matter down for some post-trial motions and hear those matters before we move into any other further evidence concerning aggravation of any kind."

Judge Strayhorn responded, "No, that's not my understanding of what the statute requires Mr. Howard." Defense counsel said, "All right." The court denied the "motion for continuance for filing of post-trial motions."

The case in aggravation was quite simple–all the evidence at trial was re-offered along with certified copies of his six prior convictions.[6] The case in mitigation

(Cont'd)
suggested that there were very few cases that would call for the death penalty. George Howard testified that "Judge Strayhorn had–you know, you learn your judges. . . . He had a reputation of being a Judge that would not impose the death penalty. I didn't believe he would do it."

6. Attempted Robbery (1965), Robbery (1972), Mail Theft (1972), Bank Theft (1972), Unlawful Use of a Weapon (1978), Possession of a Controlled Substance (twice in 1982).

was, first, the testimony of Petitioner. Second was the testimony of someone who knew Petitioner, a woman who was according to defense counsel, "by chance . . . in the court room . . . in desperation I called her."

Petitioner testified that he had long been addicted to heroin and cocaine which he had unsuccessfully attempted to escape while working for an organization that aided ex-convicts. On cross-examination Petitioner admitted selling marijuana while working in order to make ends meet. Petitioner also testified, without much detail, that he had been committed to a mental institution as a teenager because he attempted suicide and suffered from depression. Petitioner had also escaped from the institution on two occasions. On cross-examination Petitioner denied that he had ever killed anyone despite the fact that the jury had convicted him.[7]

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7. Some of the argument (and the tone) of Petitioner's brief on Mr. Howard's performance does not well serve the petitioner. Defense counsel is faulted because he "managed to highlight the focus of the State's case . . . that Mr. Griffin was convicted of other crimes." But the prosecutors, in any case like this, would have ample opportunity to highlight prior offenses with or without a defendant's testimony that the offenses were committed while under the influence of drugs. Nor did the prosecution need Petitioner's testimony to show he escaped twice from mental institutions. The decision to put Petitioner on the stand is criticized because it gave "the State . . . another opportunity to imply that Mr. Griffin was [a drug dealer's] enforcer responsible fo the death [of] countless . . . individuals." This too is a trivial point because the prosecutors did not need another chance to "imply," the rules of criminal procedure give them more than enough chances to attack the defendant. The

(Cont'd)

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(Cont'd)
decision to put Petitioner on the stand may have been wrong but not for these reasons. And these are not the only makeweight arguments.

It is unwise for counsel who attacks the competency of prior counsel to use makeweight reasons in support of a claim of ineffective assistance of counsel. This is particularly so in a case where there are far better arguments also made for that claim. A judge may infer either that petitioner's counsel thinks that the better arguments are not good enough or that petitioner's counsel does not have enough trial experience to weigh properly the state of the record.

These missteps are of no consequence here. I do not judge a case on the basis of what I think is going on in the mind of an advocate (or, as happened at trial here, Mr. Howard's opinion of his own client chewing gum on the witness stand), but rather on the merits of the appropriate arguments they do make. It is for juries that rhetorical flourishes (even if weightless) are made and repetition is required. Had there been a jury at the sentencing phase, these additional "opportunities" to make a point might, in some cases, have some tactical significance.

Judge Strayhorn sat alone on sentencing. He was an experienced trial judge, and there is no showing that he would be unduly influenced by the fact that Petitioner had both a criminal history and a mental health history (though he might be surprised if neither existed). Nor would he be influenced by another opportunity for the prosecutors to say the word "enforcer." He would not have forgotten the point made at trial and would not give prosecutors or their case credit for saying it one or two more times. This fact is acknowledged by Petitioner's counsel when they argue, on another issue, that defense counsel should not have made an argument because it "rehashed [an argument] for the Court, who had also heard it before."

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The second witness, Ida Powe, testified that Petitioner did not have a reputation for violence and was not capable of doing what he was convicted of doing. Defense counsel had not spoken to her until minutes before she testified. He used this fact in closing argument to show she was not a coached or manipulated witness.

Defense counsel's argument did touch upon Petitioner's difficult life, but its main thrust was to raise a residual doubt argument as a reason for not imposing the death penalty. It also urged that Petitioner would be better able to assist his appellate lawyers with the case's unsolved mysteries if he is not "operating on the cloud of death."

The essential criticism of defense counsel is that he offered no records documenting Petitioner's troubled past, no expert testimony, and no theme in his closing argument. The choice made by defense counsel allowed the prosecutors to cite the statutory mitigating factors and point out that none were proven.

After this, there was a delay while a presentence report was prepared. It contained some errors which were not challenged or corrected by defense counsel. Nor did defense counsel conduct further investigation of Petitioner's statements in the probation officer's report that Petitioner was having problems with his physical and mental health. Defense counsel declined to offer further evidence in mitigation when offered the chance to do so by the Court. Judge Strayhorn imposed the death sentence.

The state courts found that the decision to forego mitigation was "strategic," that is, a decision reasonably made by defense counsel under the circumstances in which he found himself. Such strategic decisions cannot be the basis for a claim of ineffective assistance of counsel even if they turn out to be quite wrong.[8]

The writ can issue only when the state court decision (1) is contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or (2) is based on an unreasonable determination of the facts in light of the evidence presented in the state courts. 28 U.S.C. §2254(d).

Unreasonable applications are those which are not only incorrect or erroneous but objectively unreasonable in light of holdings (not dicta) of the Supreme Court. *Rompilla v. Beard*, 545 U.S. 374 (2005). Unreasonable determinations of facts in light of the evidence presented have to be proven by Petitioner by clear and convincing evidence. *Miller-El v. Dretke*, 545 U.S. 231 (2005).

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8. Under current circuit precedent, I owe deference to the state courts' determination of the facts even when I hold an evidentiary hearing to determine facts. *See Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir. 2002). Other circuits disagree, *see Brown v. Smith*, 551 F.3d 424 (6th Cir. 2008), although mostly in cases involving violations of *Brady v. Maryland*, which is at issue in this case. *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003). The Supreme Court has not resolved the issue.

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The clearly established federal law on ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner must show that counsel's representation fell below an objective standard of reasonableness at sentencing. *Wiggins v. Smith*, 539 U.S. 510 (2003). If Petitioner succeeds, he must also show prejudice as a result of counsel's failings.

In this case, defense counsel made no investigation for mitigating evidence. He said so in an affidavit and in testimony before me. He did not attempt to obtain school, mental health, or prison records. He did not attempt to find mitigating witnesses, for which failure he claims no strategic reason. He did not talk to Petitioner, except in a general way, about his background. Counsel's decision was to rely on residual doubt.

Despite the general consensus that lawyers should conduct some mitigation investigation, it is not an absolute requirement to do so under Supreme Court precedent. Where there is information known to defense counsel that would require an investigation, failure to do so may be unreasonable under *Wiggins*. 539 U.S. at 526.

In this case defense counsel was informed that Petitioner had been sent to a state mental hospital in his early teenage years. Defense counsel asked for a Behavior Clinic Examination which, in Cook County, is a mental status examination which may be directed to the question of competency to stand trial and, in some cases, to the question of mental state at the time of the offense.

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Defense counsel testified in this court that, had he been aware of Petitioner's mental health history, he would have presented it in mitigation.[9]

What then are the legitimate reasons defense counsel offers for his course of conduct? He did not believe that the case warranted the death penalty – this was a case of one drug dealer killing another – and he did not believe Judge Strayhorn would impose the death penalty. I do accept that Mr. Howard believed both things to be true. He had other reasons, but I do not consider them; they all hinge on his expectations about other phases of the proceedings. I do not, in the circumstances here, find that his confidence of winning on a suppression issue on appeal can justify a decision not to prepare for the sentencing phase. Mr. Howard was also within a range of competence in his decision to

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9. It is unclear to me whether, at the hearing, Mr. Howard knew the details of that prior mental history; from the hearing as a whole, I infer that he was not fully aware of the details. Petitioner's counsel uses Mr. Howard's answer to show that Mr. Howard would have used the prior mental history if he had been diligent. I think the better argument for Petitioner here is that Mr. Howard's tactical judgment is not worthy of much respect if he says he would have used prior mental health history without a careful examination of its content and implications. Prior mental health history often serves to aggravate, not mitigate, sentences by showing a defendant to be incurably dangerous. Sociopathy is a recognized mental disease, but few competent defense counsel would ever choose to offer it in mitigation. I do not know if this argument could be made because it is not clear precisely what Mr. Howard knew when he said he would have used the material.

argue residual doubt because there was no physical evidence. However, the argument is weaker if it relies on the impeachment of Moore, because Moore's testimony was corroborated in important respects by what Petitioner said to Moore over the telephone.

While some of defense counsel's decisions are well within the range of competence, e.g., advice to waive the jury on sentencing given the views of the judge and the nature of the case, other of his decisions were not. Petitioner's argument fails to the extent that it is based on the premise that his lawyer's decision to proceed as he did cannot be called "strategic" (and thus permissible) if his lawyer had not conducted a full investigation of the alternatives. I do not find such a *per se* rule enshrined in the holdings of the Supreme Court of the United States.

Counsel's failing here is that he had no good reason not to examine, with care and due skepticism of the client's statements, the nature of his life to search for mitigation. Nor is there a good reason to fail to place any significant emphasis on showing good character in some aspects of his life.

This is so, not because exhaustive social history must be prepared in every case, but rather because in this case chances of acquittal were not high. There was a confession to a prosecutor and a taped non-custodial admission of guilt made to an informant. None of this evidence would be contradicted by Petitioner or any other witness. There was a very good reason, a patent

reason, to mine the client's history because that is where some headway might be made. At the end of such an investigation, a decision to go with residual doubt might have been reasonable, but defense counsel could not weigh the question of a troubled youth (though he knew there was evidence of it) because he never investigated it.

Competent counsel would have directed significant effort toward investigating a case in mitigation because chances of winning acquittal were slight. Even Mr. Howard does not directly dispute this; his explanation is that he believed he would be given more time – a belief he held without receiving any signal from Judge Strayhorn that more time would be allowed. "I did not do my work on time just because I thought I would get more time" is not a suitable explanation to be offered by competent counsel in a capital case.

Mr. Howard said he believed the case against Griffin was weak due to the absence of physical evidence, the impeachability of Moore, and because the judge would set aside the verdict. I do not credit this testimony. Mr. Howard did not believe this. The chosen plan of defense does not line up with such a belief. Defense counsel's decisions were based on the context of the case which included not only Petitioner but also Allen, the driver of the car used in the killing of the victim, and Ashley, the man who ordered the killing. The true target of the prosecution was the boss, Ashley, but he was dying. Petitioner's lawyer thought that if the boss died it would change the complexion of the case, so delay was the

order of the day. This confirms, in my view, that defense counsel understood the chance of outright acquittal was very low.[10] The strategic decision failed because Judge Strayhorn insisted on trial.

There was a coordinated defense with all three of the accused refusing to concede any involvement with the murder.

I find that, with respect to the sentencing phase, Mr. Howard did not meet the objective standards of reasonableness in performing his duties to Petitioner. But since his error was failing to investigate social history when he had cause to do so and to consider its usefulness as an alternative or a supplement to residual doubt, the question of whether this prejudiced his client must be addressed under the dictates of *Strickland* and common sense.

B. Prejudice to Petitioner Resulting From Counsel's Deficiency

In cases like these, petitioners customarily gather the evidence that defense counsel should have gathered

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10. The chosen strategy of counting on the death of Ashley would be based on the rational expectation that with Ashley dead, the greater part of the moral blame could be placed, without contradiction, on Ashley. This would be of value in avoiding the death sentence. And if the prosecutors were persuaded of Ashley's dominance of Petitioner, it could lead to a plea bargain. Ashley did not die soon enough for Petitioner. He was convicted but did not live long enough to appeal.

and then try to show that its absence prejudiced the petitioner.

This is, sometimes, difficult to do. The wisdom of hindsight must be discounted. *United States ex rel. Kokoraleis v. Gilmore*, 131 F.3d 692, 696 (7th Cir. 1997). And what some think is mitigation, particularly evidence of a troubled youth, may be treated by judges and juries as aggravation. The missing evidence must lead to a conclusion that "there is a reasonable *probability* that . . . the result of the proceeding would have been different" and "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694 (emphasis added).

The proffered evidence is this:

Petitioner was one of six (or seven) children in a household and was the second youngest. His father had a decent factory job as a molder. By age 8, he was identified, correctly, as a slow learner and had symptoms of attention deficit disorder. At 12, his father had been laid off, after 27 years, when his plant was closed. The family moved into worse neighborhoods. His father began drinking full time and verbally abusing his children. According to 1962 social history notes, his mother sometimes left the home because of her husband's drinking. Petitioner once rode around in buses and trains, getting off at random stops to look for his mother. At 13, Petitioner started drinking and doing drugs. At 14, and only in the sixth grade, he dropped out of school. Enforcement of truancy laws sent him to

a special school, but he ran away repeatedly and would end up in the Audy juvenile detention facility. While there he attempted suicide by jumping through a glass window. There is evidence of self-mutilation attempts, including blinding and further suicide attempts.

While at the Audy Home, his mother had a stroke and, after a short period, died. Confined at the Audy Home, Petitioner was unable to visit her. The mother had been the lynchpin of the family. When Petitioner returned home, he became the principal target of his father's verbal abuse.

Petitioner was committed to Kankakee State Hospital where he attempted to escape. He was diagnosed in several different ways: "Schizophrenic Reaction, Chronic Undifferentiated Type - with Suicidal Tendencies," "Borderline and Schizotypal Personality." His younger sister, too, was committed to mental hospitals. There are medical opinions that his use of drugs beginning around age 17 was caused by his desire to lessen the effects of his mental illness.

There is evidence to show that, toward his family, Petitioner did display loyalty, willingness to help, and provided significant aid to his family. This evidence is, of course, less helpful than the mental condition evidence, partly because it comes only from family and partly because such evidence is usually neutralized by the traditional prosecution argument that, crudely rephrased, amounts to "sure he is fine with his sisters and brothers but if you are not related to him, watch out for your life."

By and large though, this is mitigating evidence that cannot be turned by the prosecution into aggravating circumstances.[11] The evidence was not presented to the sentencing judge either directly or through the presentence report.[12]

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11. The only materials that might be of use to a prosecutor, at least in the material presented to me, is the line in one physician's report that remarked on Petitioner's "limited capacity for self observation and self correction," which could be said to be a sign of his potential to be a danger to himself and/or his community. Evidence of kindness to family members is not always helpful either since prosecutors routinely argue, with success, in all sorts of sentencing hearings from embezzlement cases to murder, that no one is safe from this defendant except his blood relations. The current wisdom regarding mental problems or a difficult life as mitigation is that such evidence works only when it supports one of two propositions. One is that the mental problem played a significant part in the genesis of the crime, e.g., a retarded boy shoots the store owner he robs because he has learned from non-stop watching of television shows that the killing is what is supposed to happen when one robs a store. The other is that his lot as a youth was one of terrible suffering and the addition of a death sentence to his suffering is morally unfair. I infer that the latter theory is the one Petitioner thinks should have been used.

12. I do count the argument that defense counsel should have provided additional information to the probation officer.

I discount the arguments about the claimed perjury of Darryl Moore with respect to ineffective assistance of counsel since Petitioner does not allege, and does not want to allege, that defense counsel was aware of the issues now raised with respect to that testimony. Whatever damage to Petitioner that can be laid at Moore's door is the fault of defense counsel. If Moore did perjure himself, then both verdict and sentence may be irretrievably flawed, but this is not the result of ineffective assistance of counsel.

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I discount the implicit attack on the author of the presentence report who relied upon what Petitioner said to him. It is true that there is some evidence that Petitioner was able to aid in his own defense, but "barely" so. But there is also evidence from the professionals at the Behavior Clinic that Petitioner was "well able" to assist in his defense. Petitioner did testify in mitigation in a manner that apparently raised red flags with Judge Strayhorn. There is no testimony from Petitioner or anyone else that he could not give a reliable account of at least some of the events of his childhood.

It is not shown that Petitioner was unable to speak the truth about himself. There is no denial that he reported a "normal childhood and good relationships with his parents and siblings" and said nothing about the bad things in his life. Nor is there evidence that defense counsel told him to lie to the probation officer.

The Supreme Court of Illinois considered prejudice as it was bound to do. On direct appeal the Court unanimously affirmed with respect to the conduct of counsel at sentencing. The opinion for the Court was exceptionally brief for a capital case, i.e., "None of [the] contentions have merit." Two Justices specially concurred and offered far different reasons than the majority did for this conclusion:

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Chief Justice Miller, specially concurring [joined by Freeman, J.]:

> The defendant complains that counsel's argument ignored the available evidence of his psychological history and focused instead on the reliability of the testimony of his involvement in the charged offense. The defendant had a lengthy criminal history, however, and he committed the murder charged here only two months after his parole from prison. . . . [t]he defendant has failed to show that a different closing argument would have produced a different result.

592 N.E.2d at 938.

The concurring justices also noted, in connection with the relevance of the childhood records to competency determinations, that the evidence was remote in time.[13]

These views were effectively adopted by a unanimous court in its opinion on appeal from the denial

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13. I observe that not only is the data from his childhood remote (he was committed in 1962), but Petitioner did not seek to use here, or in the state post-conviction proceedings, social history records that were far less remote. Petitioner was in prison for quite a while and on parole for a few weeks before the offense. Petitioner does not offer (or, at least, does not argue) that the prison records contain any mitigating information or helpful psychological data.

of the second post-conviction petition. This is unsurprising since Chief Justice Freeman, who authored the second opinion, was one of the two who specially concurred in the first affirmance. *See People v. Griffin*, 687 N.E.2d at 820, 833-34 (Ill., 1997).

It was in this appeal from the denial of the second post-conviction petition that the state court specifically addressed the claim of ineffective assistance presented here:

> We conclude that there is no reasonable probability that, absent trial counsel's alleged deficiencies, the sentencer would have found that the mitigating circumstances preclude the imposition of the death penalty. Defendant confessed that he executed the victim for money and narcotics. . . .[Defendant had] a lengthy criminal history. . . . Lastly, the post-conviction court in this appeal was the sentencer at defendant's trial. Attached to defendant's second post-conviction petition were supporting affidavits that described the proffered additional evidence. In dismissing the petition, the court stated that the introduction of this proferred evidence would not have changed defendant's sentence.

People v. Griffin, 687 N.E.2d at 834.

This was a state court finding of fact that the sentence would not have been different if the mitigation

evidence proferred here by Petitioner had been offered and argued. This is not an unreasonable determination of fact under the habeas statute. Of course, the Supreme Court of Illinois could have rejected Judge Strayhorn's findings as to the state of his own mind (on grounds perhaps of unreliability, rather than deliberate misstatement), but they did not. There is nothing unusual either about reliance on the views of a judge as to whether some previously unknown circumstances would affect the sentence. Many opinions in federal post-conviction cases are resolved, in part or whole, by judicial statements that a new circumstance would not change a sentence. Remands by Courts of Appeals in federal cases to seek the view of a sentencing judge in light of changed circumstances are common and usually controlling.

Given the deference owed to the state court findings of fact, I reject Petitioner's claim to the writ based upon ineffective assistance of counsel at sentencing.[14]

2. The Testimony of Moore

Seven months after testifying in Griffin's trial, Moore testified before a grand jury that seven persons, including Petitioner, were responsible for the murder of Robert Ciralsky. Later, while Griffin's appeal in the present case was pending, Moore made a videotaped recantation of his testimony at Griffin's trial and his testimony before the Ciralsky grand jury. He testified

14. I would reach the same conclusion in this case even if no deference was owed.

at the trial of Franklin Freeman for the Ciralsky killing that he had lied at Griffin's trial because he had been paid to do so by Detective Pochordo and members of the State's Attorney's Office.

Unsurprisingly, Petitioner filed a post-conviction petition alleging knowing use of perjury in this trial. Judge Strayhorn denied the petition, and the appeal of that ruling was consolidated with the direct appeal. The Supreme Court of Illinois affirmed in both appeals.

There is no dispute that Moore received money from the prosecutor's office. From August, 1984 to June 20, 1986, the State's Attorney's office spent over $66,000 in relocation expenses for Moore and his dependents. According to financial records, the majority of the money was paid to Moore after he testified against Petitioner (about $7,000 before testimony and the rest afterwards).

Moore took the witness stand at the federal hearing I conducted. He testified that he was a major narcotics dealer who picks and chooses when he is going to tell the truth and when he is going to lie. Petitioner was, he said, an innocent man whom he was trying to help – all he testified to at Petitioner's trial was a lie and all material statements were recanted. He claimed that "Griff," the person he spoke with during the overhear, was not Petitioner.[15] The witness relocation rationale for

15. To my knowledge, Petitioner had not denied that it was his voice, and Moore's testimony that it was not Henry Griffin that was speaking on the tape came as a visible shock to (Cont'd)

paying him money was a disguise – the money was paid for his testimony.

The assistant state's attorneys who prosecuted the case denied the money was paid for testimony and testified they believed Moore was in serious danger and the money was intended for his relocation. Detective Pochordo was asked for $200 by Moore and provided it in a check – no other money was requested or given by the police. The detective was unaware of any financial dealings between Moore and the prosecutors. All of the prosecutors and the detective testified that they believed Moore was telling the truth at Petitioner's trial.

I do not know whether Moore's testimony was credible at his trial. The jury and the judge found it credible. The question for me is whether his testimony before me was credible, and it was not. Moore was a very angry witness. He said of the prosecutors at the States Attorney's office that "I despise them."[16] This

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(Cont'd)
Petitioner's able counsel. As one of Petitioner's briefs notes, "Henry Griffin has conceded he was the other party in the taped conversation [with Moore]." Reply Br. in Support of Writ of Habeas Corpus By a State Prisoner 11.

16. Moore was deeply upset at the prosecution's failure to intervene on his behalf for a serious offense he committed sometime before testifying. Moore is serving a 60-year sentence for aggravated criminal sexual assault and his current release date, he testified, will leave him in prison for most, if not all, of the rest of his life. He believes, I find, that the failure of the prosecutors to rescue him from this (apparently) well-justified sentence for a crime against another person was an inexcusable wrong against him. I do not know whether this opinion is the reason for his recantation in state court but it clearly is a reason for his testimony in the hearing held here.

statement is true, and, had he not said so explicitly, I would have drawn the inference that he hated them from other statements he made and from his demeanor when he spoke of the prosecutors. Petitioner, wisely, concedes that Moore is a habitual liar. "Indeed," writes Petitioner's counsel, "we believe that Moore is a pathological liar."

This concession appears to me to mean that Petitioner does not argue from the truth of Moore's testimony that he lied on the witness stand in Petitioner's trial. Since it is Petitioner's burden to prove that Moore lied (and the prosecutors knew it) in order to win his claim of knowing use of perjured testimony, the argument now should be that the facts which were knowingly withheld from defense counsel made the jury's determination of Griffin's guilt unreliable. And although *Brady* only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. *See Cone v. Bell*, 129 S.Ct. 1769, 1783 n.15 (2009) (citation omitted). An argument based on *Brady v. Maryland*, rather than a *Napue v. Illinois* argument, is appropriate in this case. There is no doubt that the *Brady* claim has been in this case from the start. Yet the *Napue* claim is still pressed.

Appendix B

A. Moore's Substantive Perjury

Moore testified that he was an enforcer for Ashley, was offered the job of killing Gibson, declined to do so, and recommended Petitioner, who he knew to be another enforcer. Petitioner told Moore once before and twice after that he was involved in the killing. Moore's testimony was corroborated by Petitioner's statement to a prosecutor and, by inference and a detail, from his statement to Moore in a recorded phone call. What is not corroborated is Moore's claim that Ashley offered him the job and Moore recommended Petitioner. Moreover, Moore's account and Petitioner's confession are not on all fours because Petitioner did not mention some of the details to which Moore testified. The prosecutors, in reaching their conclusions about the truthfulness of Moore, could also rely upon the confession of Allen, the driver, of which they were aware, since it corroborated the crucial assertion that Petitioner murdered Gibson. *See People v. Allen*, 540 N.E.2d 411, 414 (Ill. App. Ct. 1989).

The argument Petitioner offers is weak. Complete corroboration of Moore's testimony was not required by law or by practice. Testimony which meshes perfectly is rare in any case and, when it does occur, raises more suspicions than the existence of differences. That Petitioner did not, in his confession, mention everything that Moore testified to is not enough to prove that the prosecutors knew he was lying; it is not enough to raise significant doubts about truth. What Petitioner seems to disregard is that corroboration that Petitioner

murdered Gibson is relevant to the prosecutor's assessment of Moore's truthfulness. The most important element of Moore's testimony is that he says that Petitioner was Gibson's murderer. It is possible that Moore, knowing that this could be proved, just jumped on the bandwagon to help himself, but this does not mean that the confession of Allen adds no weight to the prosecutor's conclusions. Moreover, when Moore agreed to call Petitioner, neither Petitioner nor Allen had confessed to anyone, and there may have been not much of a bandwagon to jump upon.

The prosecutors and Detective Pochordo all testified that they believed the testimony of Moore at trial was true. I find their testimony credible, but there remains the question of whether their actual belief was reasonable. The rule of "pure heart, empty head" has limits when applied to the duties of police and prosecutors to proceed in adherence to the Constitution.

The testimony of Franklin Freeman, offered by Petitioner, came to light after the trial of Petitioner had concluded. The prosecutors in the Ciralsky murder case (a half year or so later) wanted to use Freeman as a witness. To convince Freeman to testify, Detective Pochordo brought Moore to the Winnebago County Jail. Freeman denied any role in the killing of Ciralsky, so Pochordo allowed Moore, who had implicated Freeman, to speak alone with Freeman.

Freeman testified that Moore said he was conning Pochordo and the prosecutors, and he urged Freeman to play along. Moore suggested that if Freeman played

along he could get other charges in Winnebago County dismissed. Moore told Freeman he was getting thousands of dollars and was free to sell drugs in Chicago as Pochordo got him out of a gun charge. Freeman admitted he went along by telling Pochordo and the grand jury that he did not kill Ciralsky, but that he did steal a billfold after the shooting.

Freeman swore to me that all of his testimony at the grand jury came from Moore, Pochordo, and a prosecutor (who did not participate in Petitioner's case). Pochordo told him what to say even though the detective knew he had failed a polygraph test. The prosecutor told Freeman to answer yes to every question in the grand jury. Freeman claims that all that testimony was a lie, which he told because his other charges had not yet been dismissed. Freeman thought he was safe because he had robbed Ashley, and a jury would never believe he had been hired for the Ciralsky matter. The pending charges were dismissed. Three days later Freeman recanted.

It is difficult to credit anything that Freeman said if one hears it said face to face. The only thing I do credit is his desire to say something that would help the prosecution in the Ciralsky case in exchange for dismissals of other charges. He never had an intention to incriminate anyone in connection with Ciralsky's murder. He engaged in a low-risk fraud on the prosecution; low risk because, having robbed Ashley, a jury would find it difficult to believe either that Ashley would hire Freeman to kill someone or that Freeman

would be willing to accept an assignment which might bring him into close contact with Ashley. I find no fault with the prosecutor putting Freeman before the grand jury. Even if the prosecutor thinks the witness is lying, it is best to pin the witness down under oath, which is an appropriate use of the grand jury. The prosecutors never used him as a witness in the Ciralsky murder case but rather charged him as a perpetrator.

Petitioner argues, persuasively, that neither Freeman nor Moore had any motive to help Petitioner. They certainly had no motive to help the respondent. But they had a motive to punish those who prosecuted them. The animus of Moore was quite patent in the courtroom. The animus of Freeman was less obvious, but quite clear in his demeanor. Both are serving long sentences, and the only gratification they have left is to inflict damage on those who put them away.

This brings us to Detective Pochordo. Petitioner argues that even if the prosecutors did not know that Moore was lying, Detective Pochordo did at the time of trial. If so, this is enough to justify issuing the writ. *Kyles v. Whitley,* 514 U.S. 419 (1995).

Moore recanted his testimony against Griffin in 1986. This was after the trial, but in the recantation he says he contacted Pochordo in August 1984. He asserted that Pochordo suspected Ashley of causing several murders and Pochordo wanted a big arrest. Moore told Pochordo that he had little information about such a murder but had heard rumors on the street. Pochordo told Moore what to tell the prosecutors.

Appendix B

Pochordo denied instructing Moore to lie and testified that Moore never told him that Moore's testimony was untruthful. Petitioner argues that there is circumstantial evidence that Pochordo knew that Moore was lying because Pochordo's reports do not show any attempt to check (corroborate) Moore's tale. Pochordo did not cause Moore to be polygraphed. Pochordo knew Gibson had been seen getting into a black van. Moore told prosecutors about Griffin using a black van for six to eight months, but prosecutors concluded this story was fabricated or mistaken because the vehicle could not be found and Griffin had been in prison for part of the time covered by Moore's allegations. From this Petitioner infers that Pochordo supplied this detail to Moore. I do not understand Petitioner to be asserting that there is a possibility that Moore was simply mistaken, but simply that Moore's error is a circumstance that supports the idea that Pochordo planted the detail about the van into Moore's mind, knowing that he would use it. The final bit of circumstantial evidence is Pochordo's misrepresentation that Moore had provided him with accurate information in the past, which Pochordo is said to have done when applying for a search warrant.[17]

17. The issue of Pochordo's truthfulness in securing a warrant arises in connection with another claim about the warrant and the application of *Franks v. Delaware*. Pochordo averred that Moore had provided him with accurate information which led to ten arrests. Six of those ten cases were resolved without Moore's help and three were resolved before Moore provided information. This cooperation occurred between 1980 and 1984. When he testified here in 2002, Pochordo could not remember all the names on the chart of cases where Moore

(Cont'd)

Appendix B

That some police officers would manipulate a witness in this way or even testify falsely themselves is not a novel claim, nor would it be novel if it were true. Indeed, nineteen years ago a closely related claim came before me alleging that Detective Pochordo and another officer attempted to suborn perjury from Darryl Moore, Franklin Freeman, and James Allen in a case against Willie Stokes. In that case, I decided that qualified immunity did not protect an officer accused of suborning perjury. *Stokes v. City of Chicago*, 744 F. Supp. 183 (N.D. Ill. 1990). Less than six months after my ruling, the case was settled. Claims against Pochordo and the other officer were dismissed, and the City of Chicago paid plaintiffs $7,500.

Did Petitioner prove his claim here? The best that Petitioner can do is a tie. It is impossible for me to place any reliance on the testimony of Darryl Moore. The

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(Cont'd)
gave information. He did remember that Moore had given information about the escape of James Allen which helped in his recapture. Pochordo also testified that Moore would help, not by giving information but by referring police to another individual who could tell them something useful. In the ten cases on the chart, there were convictions in six. The claim that reliable informants provided information has, I have no doubt, been abused by some officers. But that is not established here. There are justified suspicions but not proof of unreliability. Besides, the truthfulness of Pochordo's claim is supported by another circumstance in this case, i.e., Moore's animus toward those in authority who have not saved him from spending the rest of his life in prison for aggravated sexual assault. I infer from his attitude that he believes he gave valuable information over a long period of time and was not fairly rewarded.

circumstantial evidence that Petitioner cites is not enough to overcome Moore's obvious and intense personal bias against the police and prosecutors with whom he dealt. There is no evidence that polygraphing witnesses was standard procedure (though it was done at times) so that one could draw the conclusion from Pochordo's failure to administer such a test that he was closing his eyes to the possibility of Moore lying or knew that Moore was lying. That Pochordo did not attempt to corroborate Moore's tale is not true. The telephone conversation between Moore and Petitioner was designed for that very purpose, as well as to gather evidence. Petitioner has not proved that Moore perjured himself or that Pochordo or the prosecutors knew it. And both statute (28 U.S.C. §2254(e)(1)-(2)) and case law (*Wilson v. Lash*, 457 F.2d 106 (7th Cir. 1972)) place the burden of proving deprivations of due process of law as well as any failure of state court adjudication upon the petitioner.

B. The Payments to Moore

The key issue here is not whether Moore himself or Moore's expenses were paid. This is undisputed. Nor is the issue when the payments were made. The issue is whether there was a deal to pay Moore for his testimony. If there was, the fact that payments were made after testimony is not a saving grace but rather a prudent measure with a witness like Moore. Nor is it an issue that a good deal of the money paid was for services in a different trial handled by a different unit of the State's Attorney's office. The key issue is the purpose for which

the money was spent. Was it to encourage Moore to testify against Griffin? If it was, disclosure should have been made. Witnesses who demand payment may very well be truthful, but a trier of fact should know the testimony is heard only because a fee was paid to the witness. Was the money paid to protect the witness from retaliation?[18] If it was, then the case for disclosure is weaker and, more importantly, the prejudice at trial to a defendant who is unaware of it is likely to be non-existent. Few, if any, defense counsel would want to tell the jury that the witness is being paid to relocate for fear of what defendant or his allies might do to prevent the testimony or to extract vengeance.

I credit the testimony of the prosecutors that the money was paid to relocate and to protect Moore from potential threats; to keep Moore away from his neighborhood and his home. That it failed to do so and that Moore essentially cheated the prosecution by, to a significant extent, misspending the money was unknown to the prosecutors. By some standards, one might conclude that the way money was spent on Moore was inconsistent with witness protection, but there were no guidelines in the prosecutor's office when the payments here were made. "What a relocating witness was entitled to was determined on a case by case basis."[19] There was

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18. There is no dispute that the prosecutors could reasonably believe that a witness against Ashley, if not Petitioner, would have reason to fear being murdered.

19. This language is taken from an affidavit submitted by United States District Judge William Hibbler, who was a knowledgeable supervisor in the State's Attorney's office at the time in question.

no intent to influence a witness by paying him money. *United States v. Agostino*, 132 F.3d 1183, 1195 (7th Cir. 1997).

Apart from the demeanor of the prosecutors who testified, there are circumstances that lend some small support to my conclusion about the truthfulness of their testimony that they were not paying Moore for his testimony. The first is that no one person was charged with the expenditures or keeping a record of them. Each individual prosecutor had no idea of what Moore was being paid, but several of them participated in authorizing payments. It is a minor point, but if there were an intent to pay off a witness, a careful effort to subvert justice would confine the effort to fewer actors. The second, and not so minor point, is that Moore's testimony was not so important and so helpful as to have been crucial.[20] Moore's testimony against Ashley may have been crucial – the record in that case is not before me and the case was not reviewed on appeal. Without Moore the evidence against Petitioner was his own court-reported confession and the tape/transcript of his conversation with Moore. This evidence was more than enough to convict Petitioner. Moore's testimony was helpful but not so important as to present a real temptation to prosecutors to buy his testimony against Petitioner. The third point is that Moore was not presented to the jury as an ordinary citizen. The jury

20. The respondent argues that Moore's testimony was immaterial. This is not correct. Moore's account which implicated Ashley and Griffin in the murder of Carl Gibson is material.

heard he was a killer, drug dealer, robber, and thief who said, in exchange for testimony, he was going to have a firearms charge and a drug case dismissed and a disposition of time served on an armed robbery charge reduced to robbery. He was an unattractive witness with a motive to lie for dismissals and a reduced sentence. Revealing that he was paid cash would not have diminished his credibility much more than these other factors.[21] So a prosecutor would have no particular motive to conceal the payments here. None of these circumstances preclude the possibility that prosecutors would break the law to add to the weight of their case against Petitioner. Law breakers, even lawyers, can act in ways that are inept in order to achieve small or meaningless gains, but this is unlikely considering the experience of the prosecutors in this case. The Petitioner's prosecutors were truthful before me.

Prior to the evidentiary hearing, the amended petition for the writ made five claims for the writ relying on appropriate constitutional foundations, to wit, knowing use of perjury at trial, ineffective assistance of counsel at sentencing, denial of the right to a hearing under *Franks v. Delaware,* ineffective assistance of counsel on appeal for failing to raise knowing use of false statements to secure warrants and orders and ineffective assistance of counsel at the fitness hearing. I read the petition and the memorandum in support of

21. Payment of money for testimony, even a small amount, could be useful to the defense in many circumstances. *Banks v. Dretke,* 540 U.S. 668 (2004). Payment for witness protection would not.

it as a demand for an evidentiary hearing on each of these issues.

The respondent argued that, while an evidentiary hearing was within my discretion in this case, it was unnecessary and ought not occur. Obviously I disagreed. The hearing I conducted provided a factual basis on which I could decide the claims.[22] And I have done so.

There is one issue left which deserves explication, that is, the claim that counsel was ineffective at the fitness hearing because he could have successfully attacked the conclusion of Dr. Bogan from the Behavior Clinic that petitioner was fit to stand for trial.

At the hearing George Howard testified that, on the eve of trial, he requested a fitness examination. He had not seen the institutional records of Petitioner's early commitment. Howard believed Petitioner was suffering a mental disorder related to his narcotics addiction and may have been or was, in fact, incompetent. The mental examination was had and Judge Strayhorn found Petitioner fit to stand trial after hearing the testimony

22. The respondent argued that Petitioner had not properly raised the issue of a violation of the rule in *Franks v. Delaware* and that, while the challenge to the warrant and orders was not subject to pre-trial inquiry it was fully litigated at trial and Judge Strayhorn did deny the claim. While Petitioner did, in my view, forfeit the claim, the factual findings I have made do, in any event, defeat the claim. So I find the *Franks* claim to be forfeited and, in the alternative, I find that the warrant and orders were not secured by perjury, false statements or reckless misrepresentations.

of Dr. Bogan. That witness apparently had accepted Petitioner's word that he had attempted suicide 22 years earlier and had been committed to a mental institution.

Howard's concern, as is clear from his testimony, was not centered on Petitioner's ability to understand the proceedings but rather on the other element of fitness, the ability to assist in his defense. Defense counsel testified, "in the months pending trial and in my talking to Mr. Griffin in the jail, he had not been able and had not provided me with any vital information concerning his defense other than the fact that he didn't do it and that he didn't know anything about it." This conduct is equally consistent with fitness and its absence. An innocent Griffin may well know "nothing about it"; a guilty Griffin may rationally think there is nothing he can say to explain away his statements to Moore on the telephone on the grounds that silence is better than a clumsy lie and any man with a significant criminal history might rationally decide that it is best not to tell the truth to his lawyer.

Howard delayed asking for an examination because he was waiting to see if Ashley would die and wanted to delay trial until that happened. When he was unsuccessful in doing so, he then asked for the examination.

The claim that defense counsel could have secured a finding of unfitness is inherently weak because it depends entirely on the conclusion of one expert

(Hillman) that the opinion of Dr. Bogan could not be relied upon because Dr. Bogan failed to conduct a full social history before reaching the conclusion that Petitioner was competent. Had Dr. Bogan done so, Petitioner argues, he would have found a *bona fide* doubt of competency. Dr. Hillman, who offers the criticism of Dr. Bogan, candidly states that he could not, retrospectively, offer an opinion that Petitioner was not competent to stand trial at the time he did stand trial. A *bona fide* doubt requires a hearing but it does not require a finding that Petitioner was incompetent. The practice in this case is similar to the practice existing in federal court; an examination was ordered and the court decides, on the basis of that report and/or testimony by the examiner, whether there is enough doubt to require a hearing or simply determines, after hearing the testimony or reading the report of the examining doctor, that the defendant is fit to stand trial. I am unpersuaded by Dr. Hillman's opinion that the social history would have compelled a finding of unfitness to stand trial. Moreover, Dr. Hillman does not make a case that Petitioner was unfit to stand trial, so prejudice is not shown.

For the foregoing reasons, the petition for writ of habeas corpus is denied.

ENTER:

/s/_____
James B. Zagel
United States District Judge

DATE: July 29, 2009

Supreme Court, U.S.
FILED
JAN 2 1 2011
OFFICE OF THE CLERK

No. 10-826

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

GUY PIERCE, Petitioner,

v.

HENRY GRIFFIN, Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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STATUTES INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) reads, in relevant part.

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. [¶] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that – [¶] (A) the claim relies on – [¶] (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or [¶] (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and [¶] (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

Trial

In 1985, a jury found Respondent, Henry Griffin, a 37-year-old heroin and cocaine addict, guilty of murder for the contract killing of a drug dealer and gang member. The case proceeded to a capital sentencing hearing. Griffin waived the jury for both the eligibility and sentencing stages and the court found him death eligible. At the penalty phase, the State reoffered all the evidence heard during the trial and presented certified copies of Griffin's prior convictions: 1965 (attempted robbery), 1972 (robbery), 1972 (Federal mail and bank theft), 1978 (unlawful use of a weapon), 1982 (possession of a controlled substance), and 1982 (possession of a controlled substance).

In mitigation, defense counsel called two witnesses: Henry Griffin, and an acquaintance of Griffin's named Ida Powe – a witness with whom Griffin's counsel had never spoken "until a few minutes" before she testified. Griffin testified about his drug addictions and prior convictions and denied killing anyone. He also stated that when he was a teenager he had been placed in a mental institution for attempted suicide and depression and had escaped on two occasions. Griffin's testimony on direct examination spanned less than 4 pages of transcript. Powe testified that she had known Griffin since 1974 and had never known him to commit any type of violence against another person. She did not think he was capable of murder. Counsel presented 8 total pages of testimony from two convenient witnesses. No school, mental health, or institutional records were admitted into evidence, no family members testified, and no experts were called. In closing, counsel focused on the quality of the evidence of guilt and admitted that "until just minutes ago, I had never spoken to that lady [Ida Powe] in my life."

Prior to sentencing, the court ordered and received a presentence report from the

probation department.[1] The report included the following information: Griffin had been a truant who did not finish grammar school; he "had a normal childhood and good relationships with his parents and siblings;" he had a common law wife with whom he had two children; he had several prior convictions; he developed a drug addiction in his mid-to-late twenties; and while a teen he was in a mental hospital for depression. The sentencing range was between 20 years and a death sentence. Ill. Rev. Stat., ch. 38, ¶ 9-1(b)(5) (West 1984); Ill. Rev. Stat., ch. 1005, ¶ 1005-8-1 (a)(1) West 1984). Without specific findings, the court sentenced Griffin to death. Griffin appealed directly to the Illinois Supreme Court.

Review in State Court

On direct appeal, Griffin raised ineffective assistance of counsel claims relating to his counsel's performance at sentencing based on *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Griffin*, 592 N.E.2d 930, 934 (Ill. 1992) (*Griffin I*), *cert. denied*, 507 U.S. 924 (1993). The Illinois Supreme Court affirmed the conviction and death sentence stating that Griffin "failed to make the necessary *Strickland* showing."[2] *Id.* at 935.

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[1]In its Petition for Certiorari, Petitioner incorrectly states: "Counsel also submitted a presentence investigation report containing information on Griffin's personal and family background, including his relationships with his parents, siblings, wife and children." Petition at 4. The presentence investigation was ordered by the trial judge, not defense counsel, and prepared and submitted for the court's consideration by the probation department.

[2]Petitioner incorrectly states:"The Illinois Supreme Court rejected the claim because the [mental health] records were remote in time." Petition at 4. The only discussion of the records remoteness is in the concurring opinion not adopted by a majority of the Illinois Supreme Court. *Griffin I*, 592 N.E.2d at 937. More significantly, the mental health records to which the court refers were never entered into evidence at the sentencing hearing.

Griffin again advanced his *Strickland* claim in a state post-conviction petition.[3] The trial court dismissed the petition without an evidentiary hearing. The court orally ruled that defense counsel's performance had not been deficient and that the court

> was certain that this was one case, one of several or maybe five or six cases this Court had in its experience and as a trial court extending over 25 years, that death was absolutely required as punishment in this case because your client, Mr. Griffin, was the shooter here.
>
> He accepted money from Ashley here. He accepted that money for the purpose of executing the decedent here and this Court has no question in it's mind that the only punishment that would justify the deceased existence would be an eye for an eye and that is death....

Id. Griffin appealed.

On appeal, the Illinois Supreme Court affirmed. *People v. Griffin*, 687 N.E.2d 820 (Ill. 1997) (*Griffin II*), *cert. denied*, 524 U.S. 956 (1998). Despite trial counsel's affidavit stating his omissions were not strategic choices and despite the denial of an evidentiary hearing, the state supreme court determined that counsel's performance was not constitutionally deficient because his failure to present mitigating evidence was "clearly a strategic decision." *Id.* at 833. In terms of prejudice, the court focused on the aggravation presented, citing Griffin's unsigned statement and his "lengthy" criminal history. *Id.* at 834. As to the evidence uncovered at post-conviction, the court stated that the proffered mitigation "either is cumulative to the evidence already introduced at trial or is not inherently mitigating." *Id.* The court also noted that the post-conviction court was the sentencer and, "the [trial] court stated that the introduction

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[3]Petitioner describes what Griffin attached to his petition in support of his *Strickland* claim: "Griffin said that counsel failed to introduce his school, mental health and prison records, a psychological evaluation, and affidavits from five family members." Petition at 4. The petition was supported by affidavits of eleven relatives and friends; an affidavit of trial counsel in which he admitted that he failed to conduct a mitigation investigation; mental health, school, and prison records that counsel failed to obtain; and a report and affidavit of a clinical psychologist who examined Griffin and pertinent data.

of this proffered evidence would not have changed defendant's sentence." *Id.*

Federal Habeas Corpus Proceedings

Griffin sought habeas relief from the Northern District of Illinois raising the *Strickland* claim, *inter alia*. The district court ordered an evidentiary hearing on the claim limiting the hearing to the performance prong, and reviewing records and affidavits submitted at state post-conviction proceedings to assess prejudice. During the pendency of the proceedings, Griffin's death sentence was commuted to life imprisonment.

In an opinion and order dated July 29, 2009, the district court denied habeas relief. *Griffin v. Mathy*, No. 98 C 5024 (N. D. Ill., July 29, 2009) (Slip Op. 30). The court found counsel made no investigation for mitigating evidence as he neither interviewed any witnesses nor collected any records, and counsel did not have good reason for failing to conduct this investigation. *Id.* at 10-13. Contrary to the state court's opinion, the district court held that counsel's decision to present a residual doubt argument in lieu of conducting an investigation into his client's background did "not meet the objective standards of reasonableness in performing his duties to Petitioner." *Id.* at 13.

In terms of prejudice, the district court rejected the majority of the state court's prejudice analysis as it had the performance analysis. The court determined that the proffered mitigation "by and large... cannot be turned by the prosecution into aggravating circumstances" and further that the evidence was not cumulative in that "[it] was not presented to the sentencing judge either directly or through the presentence report." *Id.* at 15-16. However, the district court denied the claim based on what it termed a "state court finding of fact that the sentence would not have been different if the mitigation evidence proffered here by Petitioner had been offered and argued" and the "deference owed to" such a finding. *Id.* at 17-18. According to the

district court, this was "not an unreasonable determination of fact under the habeas statute." *Id.* at 18. Griffin appealed.

Court of Appeals

On appeal, the State conceded that trial counsel's failure to conduct any investigation into mitigation was unreasonable, and thus the court of appeals focused its attention on whether Griffin was prejudiced. *Griffin v. Pierce*, 622 F.3d 831, 843-44 (7th Cir. 2010). According to the court, Griffin "cleared the bar" of *Strickland*'s prejudice component because, had counsel performed effectively, "the sentencing court would have learned of the kind of troubled history [the Supreme Court has] declared relevant in assessing a defendant's moral culpability." *Id.* at 844 (citations omitted).

In addressing whether the state court's application of *Strickland*'s prejudice prong was unreasonable under AEDPA, the court of appeals addressed the reasons the Illinois Supreme Court relied on in denying Griffin's ineffectiveness at sentencing claim, *i.e.*, the trial judge's statement that the proffered evidence would not have changed Griffin's sentence, the weight of the aggravation, and the quality of proffered mitigation, which it determined was cumulative and/or not inherently mitigating.

The court of appeals stated that "the first problem" with the Illinois Supreme Court's prejudice determination was that it was "unclear to [the court of appeals] how much weight the state supreme court gave" the trial court's determination that the new evidence would not have changed the sentence. *Id.* at 845. The court of appeals noted that although it may give weight to such a statement, the statement is not conclusive, since "the question is not whether a particular judge would have imposed a different sentence, but rather whether there was a 'reasonable probability' that the sentence would have been different," *i.e.*, "an objective evaluation of the evidence." *Id.*

In addressing the other reasons, the court of appeals agreed with the district court that the proffered mitigation was neither "cumulative" nor "not inherently

mitigating" and "the court's determination to the contrary was unreasonable." *Id.* The court of appeals determined that although the Illinois Supreme Court gave consideration to the aggravation, "it did not properly evaluate the totality of the mitigation evidence and reweigh it against the aggravation evidence as it must." *Id.* Because Griffin had a "tragic personal history" in which his "childhood was anything but normal" and "horrendous," the court of appeals determined that there is a reasonable probability that the evidence would have made a difference in Griffin's sentence and that the Illinois Supreme Court's determination was an unreasonable application of *Strickland*. *Id.* at 845-46.

Thus, the court of appeals reversed the district court's judgment in part and remanded with instructions, granting Griffin's habeas petition on the *Strickland* claim only and allowing the State 120 days within which to resentence Griffin. *Id.* at 846.

REASON FOR DENYING THE PETITION

The Petition for Certoriari should be denied because Petitioner's alleged split in authority is nonexistent, none of the cases cited by Petitioner address the question presented, and all of the cases, including those where the judge both sentences the defendant and later rules on ineffective assistance of counsel claims, use the same standard to analyze *Strickland v. Washington* claims under AEDPA. 466 U.S. 668 (1984).

I.

NO CONFLICT EXISTS AMONG THE CIRCUITS REGARDING HOW AEDPA APPLIES IN CASES WHERE THE SAME JUDGE BOTH SENTENCES THE DEFENDANT AND LATER RULES ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Petitioner claims there is a conflict among the circuits in ineffective assistance of counsel claims concerning the level of deference required under AEDPA "for a state court *finding of fact* following a bench trial in which the trial judge determined that omitted evidence would not have a reasonable probability of changing the outcome." Petition at 8 (emphasis added).[4] Petitioner argues that the conflict exists "in ineffective

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[4]Petitioner's question presented and argument misstate the law. Under *Strickland*, the prejudice prong is not a "finding of fact" as stated by Petitioner, rather, it is a mixed question of law and fact.

> [I]n a federal *habeas* challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d)... it is a mixed question of law and fact... [and] both the performance and prejudice component of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland, 466 U.S. at 698 (citations omitted).

assistance of counsel claims involving bench trials or bench sentencing hearings [because] the Seventh Circuit is according much less deference to state court findings of fact than the Second, Eleventh and Sixth Circuits." Petition at 13.

The Petition should be denied because there is no conflict between circuits since none of the cases cited by Petitioner actually addresses the level of deference required by AEDPA when the sentencing judge during post-conviction proceedings concludes that additional mitigation evidence would not have made a difference. Moreover, each case applies the well-established standards of *Strickland* and AEDPA. Finally, Petitioner claims *Porter v. McCollum*, 130 S. Ct. 447 (2009) – a case the circuit court and Respondent rely upon – is distinguishable from Griffin's case because it involved a jury sentencing. However, *Porter* involved a bench sentencing and it too applied the same, familiar standards under AEDPA. *Id.*

None of the cases cited by Petitioner addresses the question of the proper level of deference afforded under AEDPA when the trial or sentencing judge concludes that additional evidence would not have made a difference for purposes of establishing *Strickland* prejudice. In *Kokal v. Sec'y Dep't of Corr.*, there is no indication that the same judge presided over the sentencing and post-conviction proceedings. Consequently, there is no indication that the same judge concluded that the additional mitigation evidence would not have made a difference to his sentencing decision. Thus, the circuit court had no occasion to consider the level of deference owed to such statements. 623 F.3d 1331, 1347-50 (11th Cir. 2010). It appears that Petitioner relies on *Kokal* because the circuit court stated it was "obliged to afford AEDPA deference to the Florida Supreme Court's decision," a proposition Griffin does not contest and the standard the Seventh Circuit applied. *Id.* at 1346.

The same is true for *Phillips v. Bradshaw*. The case never even suggests that the trial judge stated that the proffered mitigation would not have changed petitioner's

sentence, and the circuit court does not rely on such a statement in its prejudice analysis. 607 F.3d 199 (6th Cir. 2010). Petitioner appears to rely on the case for the principle that under AEDPA where the state court decided the issue in a cursory fashion, the Sixth Circuit engages in a more thorough review. 607 F.3d at 299.

The only case Petitioner cites that actually mentions that the trial judge was unconvinced by evidence presented following trial is the *Dunham* case, where the Second Circuit noted that the same state judge "was unmoved by one of the allegedly inconsistent statements" in a post-trial ineffective assistance of counsel claim for failure to impeach a witness. 313 F.3d 724, 732 (2d Cir. 2002). In that case, however, the Second Circuit simply determined that "trial counsel's decision was strategic" and that the petitioner "suffered no prejudice" and thus, never discussed or applied the deference standards of AEDPA. *Id.* Thus, it provides no basis for Petitioner's assertion that it applied a level of deference different from that applied by the Seventh Circuit.

Not only do the cases upon which Petitioner rely fail to address the specific issue upon which Petitioner seeks certiorari, the circuit courts in these cases either afforded the well-established level of deference required under AEDPA – the same level the Seventh Circuit employed in this case – or in one instance did not even apply the AEDPA standards. *Kokal*, 623 F.3d at 1346-47 (acknowledging that "the idiosyncrasies of the particular decisionmaker... are irrelevant to the prejudice inquiry," and that under AEDPA, the court's "task, then, is to ask whether the Florida Supreme Court unreasonably weighed the aggravating evidence against the totality of the evidence in mitigation."); *Phillips*, 607 F.3d at 209 ("in judging the reasonableness of the adjudication, we look to *Wiggins* [ ] and *Rompilla* ... because they ... applied the clearly established precedent as *Strickland*." (citations omitted)); *Dunham*, 313 F.3d at 732 (circuit court did not apply AEDPA deference because ineffectiveness claim lacked merit); *similarly, Griffin*, 622 F.3d at 845 (acknowledging that "the question is not

whether a particular judge would have imposed a different sentence, but rather whether there was a 'reasonable probability' that the sentence would have been different," the Seventh Circuit court decided whether the "Illinois Supreme Court's determination that Griffin was not prejudiced by his counsel's deficient performance at sentencing was an unreasonable application of *Strickland*.")

Finally, Petitioner characterizes the *Kokal* and *Phillips* cases as bench sentencing cases even though juries recommended death because the trial courts under the law of each state – Florida and Ohio respectively – independently review the evidence and make findings regarding the aggravating and mitigating circumstances. Petitioner claims that cases such as these where the judge is the sentencer, including Griffin's case, are "distinct from cases involving sentencing *juries*" that the Seventh Circuit and Griffin relied upon. Petition at 9 (emphasis in original) citing, *inter alia*, *Porter*, 130 S. Ct. at 453.

Yet, Petitioner fails to distinguish the *Porter* case, since *Porter* also involved a sentencing judge, as it is a Florida case, and thus used the same sentencing procedure as in *Kokal*. 130 S. Ct. at 449. After hearing evidence in state post-conviction proceedings, the same trial judge during post-conviction proceedings held"that Porter had not been prejudiced by the failure to introduce any" of the mitigation that was presented. *Id.* at 449-451. After the circuit court denied relief, this Court granted habeas relief determining that the Florida Supreme Court unreasonably applied *Strickland* under 28 U.S.C. § 2254(d)(1) when it held that Porter was not prejudiced by his counsel's deficient performance. *Id.* at 444. The AEDPA standard in *Porter* is no different than the standard applied in Griffin or the Supreme Court cases the circuit court cited. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Williams v. Taylor*, 529 U.S. 362 (2000). Essentially, Petitioner is asking this Court to create a new rule of law without providing a single reason for doing so.

The Seventh Circuit's opinion fits neatly within prior Supreme Court precedent. The court of appeals applied the *Strickland* prejudice standard when it determined that the case "falls in line with those cases in which the Supreme Court has concluded that counsel's failure to investigate and present proffered mitigation evidence prejudiced petitioner." *Griffin*, 622 F.3d at 844, citing, *Rompilla*, 545 U.S. at 390-93; *Wiggins*, 539 U.S. at 535; and *Williams*, 529 U.S. at 395-96. The court objectively evaluated the evidence to determine whether there was a reasonable probability that the sentence would have been different. *Id.* at 845; *see Strickland*, 466 U.S. at 695 ("[the assessment of prejudice] should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.) Applying AEDPA, the circuit court agreed with the district court that the state court's determination that the proffered mitigation was either cumulative or not inherently mitigating was unreasonable. The circuit court concluded that the state court "did not properly evaluate the totality of the mitigation evidence and reweigh it against the aggravation evidence as it must." *Id.*, citing *Porter*, 130 S. Ct. at 453-54. Thus, under AEDPA, the circuit court ruled that the Illinois Supreme Court's determination that Griffin was not prejudiced by his counsel's performance at sentencing was an unreasonable application of *Strickland*. *Id.* at 846.

Because there is no conflict among the circuits, the Petition for Certirorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent, Henry Griffin, respectfully prays that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 10-826

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

GUY PIERCE, Petitioner,

v.

HENRY GRIFFIN, Respondent.

NOTICE AND CERTIFICATE OF SERVICE

TO: The Honorable William K. Suter
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Please take notice that I have mailed the original and ten copies of the Motion to Proceed *In Forma Pauperis* and the Brief in Opposition in the above-captioned matter to the Clerk of the Court, and that I am serving the Attorney General of Illinois and State's Attorney of Cook County each with three copies, and the Petitioner with one copy by depositing the copies in the mail in Chicago, Illinois, with sufficient prepaid postage and addressed as indicated above on this 21st day of January, 2011. All parties required to be served have been served.

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No. 10-826

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GUY PIERCE, Warden, Pontiac Correctional Center,

Petitioner,

v.

HENRY GRIFFIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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REASONS FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED WHERE THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE LEVEL OF DEFERENCE REQUIRED UNDER THE AEDPA FOR A STATE COURT FINDING OF FACT FOLLOWING A BENCH TRIAL IN WHICH THE TRIAL JUDGE DETERMINED THAT OMITTED EVIDENCE WOULD NOT HAVE A REASONABLE PROBABILITY OF CHANGING THE OUTCOME.

Petitioner filed a petition for writ of certiorari arguing that, when reviewing an ineffective assistance of counsel at sentencing claim brought under 28 U.S.C § 2254(d) and the AEDPA, the Seventh Circuit refused to defer to the state court factual determinations made by the very judge who made the original sentencing determination. (Pet. 8.) Petitioner argued that, in a similar circumstance, the Second Circuit did defer to the state court findings of fact. (Pet. 11.) Thus, petitioner argued that there is a conflict among the circuits in AEDPA cases in terms of the level of deference given to state court findings. (Pet. 10-12.)

Respondent filed a brief in opposition to certiorari in which he asserts that no conflict exists among the circuits regarding how 28 U.S.C § 2254(d) and the AEDPA applies in these cases. (Opp. 8-9.) Respondent insists that the cases relied on by petitioner do not support the argument in favor of certiorari and that, contrary to petitioner's assertions, the cases all employ the same standard of review. (Opp. 9-11.)

Respondent is mistaken. The cases cited by petitioner highlight the disparity among the circuits in terms of the

deference they give to the state court findings. (Pet. 10-12.) In *Dunham v. Travis*, 313 F.3d 724 (2d Cir. 2002), the state court trial judge, who sat as trier of fact, rejected a *Strickland* claim, finding that the omitted impeachment evidence would not have changed the outcome of the trial. The Second Circuit deferred to that state court finding. In contrast, in the case at hand, the Seventh Circuit conducted its own "objective evaluation of the evidence" because "the question is not whether a particular judge would have imposed a different sentence, but rather whether there was a 'reasonable probability' that the sentence would have been different." *Griffin*, No. 09-3138 (Slip op. 28) (App. A at 29). The Seventh Circuit's discussion of the *Strickland* issue was totally devoid of even a single reference to the deference normally accorded under the AEDPA to state court findings.

Moreover, contrary to respondent's assertion, petitioner never once suggested that the circuit courts of appeal were citing different standards of review. (Opp. 10.) Rather, the conflict lies in the level of deference the courts are giving to the state court findings. (Pet. 10-12.)

Petitioner acknowledges that he referred to *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009), as a case in which the jury imposed sentence when, in fact, the jury only recommended the death sentence and the court imposed it. (Petitioner. 9; Opp. 11.) Although petitioner misspoke, the point remains the same: more deference should be accorded to a sentence imposed by the court than a jury when, post-sentencing, an inmate presents omitted mitigation and the sentencing judge says that evidence would not have changed the outcome.

Moreover, as highlighted in this Court's recent decision in *Harrington v. Richter,* 2011 U.S. LEXIS 912 (January 19, 2011), there is a difference between properly applying the AEDPA standard of review and merely paying lip service to it.

In *Richter,* as in the case at hand, the inmate raised a post-conviction claim of ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984). *Richter,* 2011 U.S. LEXIS 912 at 18-19. When the California state court denied the claim, Richter raised it in federal court in a petition for writ of habeas corpus under 28 U.S.C § 2254(d). *Richter* at *20. The district court denied the writ, but the Ninth Circuit Court of Appeals, sitting *en banc,* reversed. *Id.* at *20. The United States Supreme Court reversed the *en banc* decision, holding that the Ninth Circuit failed to "accord required deference to the decision of a state court" and so the circuit court's opinion amounted to "clear error." *Id.* at *12-13. The Court explained as follows.

> Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA. The court explicitly conducted a *de novo* review, 578 F.3d at 952; and after finding a *Strickland* violation, it declared, without further explanation, that the "state court's decision to the contrary constituted an unreasonable application of *Strickland*." 578 F.3d at 969. AEDPA demands more. *Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that*

> *those arguments or theories are inconsistent with the holding in a prior decision of this Court.* The opinion of the Court of Appeals all but ignored "the only question that matters under § 2254(d)(1)." *Lockyer* v. *Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).
>
> The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review: Because the Court of Appeals had little doubt that Richter's *Strickland* claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the state court's result and ignores further limitations of § 2254(d), including its requirement that the state court's decision be evaluated according to the precedents of this Court. See *Renico* v. *Lett*, 559 U.S. ___, ___130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (slip op., at 11-12). It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. See *Lockyer*, *supra*, at 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144.

Richter, id. at *28-29 (emphasis added).

In the case at hand, the United States Court of Appeals for the Seventh Circuit also conducted a *de novo* review of Griffin's ineffective assistance of counsel claim. The court, relying on its own precedent, asserted:

> ...it is unclear to us how much weight the state supreme court gave to Judge Strayhorn's statement that the introduction of the proffered evidence would not have changed Griffin's sentence. Though we, and the Illinois Supreme Court, may give weight to such a statement, it is not conclusive. *Raygoza v. Hulick*, 474 F.3d 958, 964 (7th Cir. 2007) (stating that where the same judge presides over both the postconviction proceeding and trial, "we cannot accept as conclusive the judge's statement that the new evidence would not have made any difference"). The question is not whether a particular judge would have imposed a different sentence, but rather whether there was a "reasonable probability" that the sentence would have been different. In assessing that probability we conduct an objective evaluation of the evidence. *Id.* at 964-65.

Griffin v. Pierce, No. 09-3138 (7th Cir. 2010) (Slip Op. 28) (App. A at 29)

Thus, as in *Richter*, the Seventh Circuit reviewed the claim under the *Strickland* analysis without regard for the strictures imposed by the AEDPA. But, *Richter* unequivocally prohibits such review. 2011 U.S. LEXIS 912, *27. Rather than conducting a *Strickland* analysis, the questions on habeas review are *supposed* to be: whether the arguments or theories supported the state court's decision; and whether it is possible fairminded jurists could disagree that those arguments or theories were inconsistent with *Strickland*. *Richter*, at *28-29. But, the Seventh Circuit, in its rush to "conduct an objective

evaluation of the evidence," overlooked the AEDPA and failed to "ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Id.* at *31-32.

As in *Richter,* the Seventh Circuit completely ignored the deference demanded by the AEDPA. Thus, this Court should grant certiorari to address this urgent problem and to resolve the conflict among the circuits.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

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